90-402

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

BETTY JO MAYESKE, *et al.*,

Petitioners,

v.

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether Rule 3(c) of the Federal Rules of Appellate Procedure, and this Court's holding in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), permit an appeal by litigants not expressly named in a notice of appeal, but whose intent to appeal is fairly indicated in the body of the notice.

PARTIES BELOW

The Plaintiffs and Appellants in the proceedings below were as follows:

Betty Jo Mayeske, Betty Ann Morrison, Shavana Margaret King, and Charles David Martin (deceased) by and through his representative, Charles Liner.

The Defendants and Appellees in the proceedings below were as follows:

International Association Of Fire Fighters, International Association of Fire Fighters Officers Retirement Plan, International Association of Fire Fighters Staff Representatives Pension Plan, International Association Of Fire Fighters Employees' Pension Plan, Alfred K. Whitehead, Elliott Hastings, James McGowan, Daniel Eberhart and John A. Gannon.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

PARTIES BELOW ii

TABLES OF AUTHORITIES iv
TABLE OF CASES iv
TABLE OF STATUTES xi
TABLE OF FEDERAL RULES xii
TABLE OF OTHER AUTHORITIES xiii

OPINIONS BELOW 2

JURISDICTION 3

RULES INVOLVED 3

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 7
A. THE DECISION IN *TORRES* 8
B. THE AFTERMATH OF *TORRES* . . . 9
C. SPLIT IN THE CIRCUITS 12
D. THE CAPTION RULE 14
E. JUDGMENT NOMENCLATURE . . 15
F. DENIAL OF JUSTICE 16
G. JUDICIAL ECONOMY 17

CONCLUSION 18

TABLES OF AUTHORITIES

TABLE OF CASES

Abatti v. Comm'r of IRS, 859 F.2d 115 (9th Cir. 1988) 12

Aetna Life Ins. Co. v. Alla Medical Servs., Inc., 855 F.2d 1470 (9th Cir. 1988) 12

Akins v. Board of Governors of the State Colleges & Univs., 867 F.2d 972 (7th Cir. 1988) 11

Al-Jundi v. Estate of Rockefeller, 885 F.2d 1060 (2d Cir. 1989) 9

Allen Archery, Inc. v. Precision Shooting Equip., Inc., 865 F.2d 896 (7th Cir. 1989) 11

Allison v. Ticor Title Ins. Co., 1990 U.S.App.LEXIS 11927 (7th Cir. 1990) 11

Alsup v. Int'l Union of Bricklayers and Allied Craftsmen, Local 3, 1990 U.S.App.LEXIS 8410 (6th Cir. 1990) . 10

Armistead v. Sullivan County Jail, 856 F.2d 192 (unpublished decision at 1988 U.S.App.LEXIS 11946) (6th Cir. 1988) 11

Arnow v. United States Nuclear Regulatory Comm'n, 868 F.2d 223 (7th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 61 (1989) 11

Barnett v. Petro-Tex Chem. Corp., 893 F.2d 800, *reh'g denied*, 1990 U.S.App.LEXIS 4465 (5th Cir.), *cert. denied*, ___ U.S. ___, 100 S.Ct. 3274 (1990) 10

Barnett v. Stern, 1990 U.S.App.LEXIS 13171 (7th Cir. 1990) 11

Baucher v. Eastern Indiana Prod. Credit Ass'n, 906 F.2d 332 (7th Cir 1990) 11

Baylis v. Marriott Corp., 906 F.2d 874 (2d Cir. 1990) . 9

Beale v. Cain, 869 F.2d 1488 (unpublished decision at 1989 U.S.App.LEXIS 1931) (6th Cir. 1989) 11

Bigby v. Chicago, 871 F.2d 54 (7th Cir. 1989) 11

Birdsong v. Wrotenbery, 901 F.2d 1270 (5th Cir. 1990) 10

Brotherhood of Ry. Carmen v. Atchison, Topeka & Santa Fe Ry. Co., 894 F.2d 1463 (5th Cir. 1990), *petition for cert. filed* (June 28, 1990, No. 90-17) 10

Browning v. Navarro, 894 F.2d 99 (5th Cir. 1990) . . 10

Bryant v. Int'l Fruit Prod. Co., 859 F.2d 152 (unpublished decision at 1988 U.S.App.LEXIS 12868) (6th Cir. 1988)11

Chicago Truck Drivers Union Pension Fund v. Louis Zahn Drug Co., 890 F.2d 1405 (7th Cir. 1989) 11

Chicano Educ. & Manpower Servs. v. United States Dep't of Labor, 1990 U.S.App.LEXIS 12480 (9th Cir. 1990) 11

Chivas Prods. Ltd. v. Owen, 902 F.2d 32 (unpublished decision at 1990 U.S.App.LEXIS 6745) (6th Cir. 1990) 10

Cotton v. U.S. Pipe & Foundry Co., 856 F.2d 158, *reh'g denied*, 861 F.2d 1281 (11th Cir. 1988) 12

Cox v. Seabold, 898 F.2d 153 (6th Cir. 1990) 10

Crabtree v. Muchmore, 904 F.2d 1475 (10th Cir. 1990) 12

Cruz v. Melendez, 902 F.2d 232 (3d Cir. 1990) 10

De Luca v. Long Island Lighting Co., 862 F.2d 427 (2d Cir. 1988) 10

District of Columbia Nurses' Ass'n v. District of Columbia, 854 F.2d 1448 (D.C. Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3189 (1989) 7, 12

Dura Systems, Inc. v. Rothbury Inv., Ltd., 886 F.2d 551 (3d Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 844 (1990) 10

Foman v. Davis, 371 U.S. 178 (1962) 8, 16

Ford v. Nicks, 866 F.2d 865 (6th Cir. 1989)(*overruled by Minority Employees of Tenn. Dep't of Employment Sec., Inc. v. Tenn. Dep't of Employment Sec.*, 901 F.2d 1327 (6th Cir. 1990)) 11

FTC v. Amy Travel Serv., Inc., 894 F.2d 879 (7th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 366 (1989) . . 11

Gonzalez-Vega v. Hernandez-Colon, 866 F.2d 519 (1st Cir. 1989) 9

Goos v. ICC, ___ F.2d ___, 1990 U.S.App.LEXIS 14707 (8th Cir. 1990) 11

Graves v. Raypak, Inc., 891 F.2d 254 (9th Cir. 1989), *withdrawn* (February 2, 1990) 12

Griffith v. Johnston, 899 F.2d 1427, *reh'g denied*, 904 F.2d 705 (5th Cir. 1990) 10

Heussner v. National Gypsum Co., 887 F.2d 672, *reh'g denied*, 1989 U.S.App.LEXIS 19804 (6th Cir. 1989) and 1990 U.S.App.LEXIS 10115 (6th Cir. 1990) 10

Holt v. Norris, 865 F.2d 258 (unpublished decision at 1988 U.S.App.LEXIS 17113) (6th Cir. 1988) 11

In Re Grand Jury Proceedings, 875 F.2d 927 (1st Cir. 1989) 9

In Re Highway Truck Drivers Local 107, 888 F.2d 293 (3d Cir. 1989) 10

In Re Kerr, 1990 U.S.App.LEXIS 12019 (8th Cir. 1990)11

In Re San Juan Dupont Plaza Hotel Fire Litig., 888 F.2d 940 (1st Cir. 1989) 9

In re Woosley, 855 F.2d 687 (10th Cir. 1988) 12

Jenkins v. Comm'r of Internal Revenue, 880 F.2d 414 (unpublished decision at 1989 U.S.App.LEXIS 11115) (6th Cir. 1989) 10

Johnson v. Trustees of Western Conference of Teamsters Pension Trust Fund, 879 F.2d 651 (8th Cir. 1989) . . 12

Jusino v. Zayas, 875 F.2d 986 (1st Cir. 1989) 9

Kaiser v. Armstrong World Indus. Inc., 872 F.2d 512 (1st Cir. 1989) 9

Kam Koon Wan v. E.E. Black, Ltd., 182 F.2d 146 (9th Cir. 1950) 16

Kim v. Fujikawa, 871 F.2d 1427 (9th Cir. 1989) . . . 12

King v. Otasco, Inc., 861 F.2d 438 (5th Cir. 1988) . 10

Kowaleski v. Director, Office of Workers' Compensation Programs, 879 F.2d 1173 (3d Cir. 1989) 10

Lingamneni v. Board of Governors of State Colleges & Univs., 1990 U.S.App.LEXIS 9640 (7th Cir. 1990) . 11

Madewell v. Roberts, 1990 U.S.App.LEXIS 12847 (8th Cir. 1990) 11

Manis v. Sterling, 862 F.2d 679 (8th Cir. 1988) 11

Mariani-Giron v. Acevedo-Ruiz, 877 F.2d 1114 (1st Cir. 1989) 9

Marin-Piazza v. Aponte-Roque, 909 F.2d 35 (1st Cir. 1990) 9

Masquerade Novelty, Inc. v. Unique Industries, Inc., ___ F.2d ___, 1990 U.S.App.LEXIS 15120 (3d Cir. 1990) 9

May v. Houston Post Pension Plan, 898 F.2d 1068 (5th Cir. 1990) 10

Mayeske v. Int'l Ass'n of Fire Fighters, 905 F.2d 1548 (D.C. Cir. 1990) 12

McCuaig v. Brown, 859 F.2d 152 (unpublished decision at 1988 U.S.App.LEXIS 13081) (6th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1169 (1989) 11

McLemore v. Landry, 898 F.2d 996 (5th Cir. 1990), *petition for cert. filed* (July 23, 1990, No. 90-151) . . 10

McMichael v. United States, 856 F.2d 1026 (8th Cir. 1988) 11

Meehan v. Los Angeles, 856 F.2d 102 (9th Cir. 1988) 12

Mikeska v. Collins, 900 F.2d 833 (5th Cir. 1990) . . . 10

Minority Employees of Tenn. Dep't of Employment Sec., Inc., v. Tenn. Dep't of Employment Sec., 901 F.2d 1327 (6th Cir. 1990), *petition for cert. filed* (July 25, 1990, No. 90-169) 10

Mylett v. Jeane, 879 F.2d 1272, *reh'g denied*, 1989 U.S.App.LEXIS 15581 (5th Cir. 1989) 10

National Center for Immigrants' Rights, Inc. v. INS., 892 F.2d 814 (9th Cir. 1990) 12

Nevada Highway Patrol Ass'n v. Nevada, 899 F.29 1549 (9th Cir. 1990) 12

Obadele v. Thornburg, 876 F.2d 1008 (unpublished decision at 1989 U.S.App.LEXIS 7816) (D.C. Cir. 1989)12

Police Officers for Equal Rights v. Columbus, 871 F.2d 1088, (unpublished decision at 1989 U.S.App.LEXIS 3729) (6th Cir. 1989) 10

Pope v. Miss. Real Estate Comm'n. 872 F.2d 127 (5th Cir. 1989) 10

Rendon v. AT & T Technologies, 883 F.2d 388 (5th Cir. 1989) 10

Robinson v. Chicago, 868 F.2d 959, *reh'g denied*, 1989 U.S.App.LEXIS 7032 and 7033 (7th Cir. 1989), *cert. dismissed*, ___ U.S. ___, 110 S.Ct 708, and *cert. denied*, ___ U.S. ___, 110 S.Ct. 756 (1990) 11

Rogers v. National Union Fire Ins. Co., 864 F.2d 557 (7th Cir. 1988) 11

Rosario-Torres v. Hernandez-Colon, 889 F.2d 314 (1st Cir. 1989) 9

Santos-Martinez v. Soto-Santiago, 863 F.2d 174 (1st Cir. 1988) 9

Shatah v. Shearson/American Express, Inc., 873 F.2d 550 (2d Cir. 1989) 9

Smith v. White, 857 F.2d 1042 (5th Cir. 1988) 10

Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988) . . . . . i, 7-9, 12-17

Triad Assocs., Inc. v. Chicago Hous. Auth., 1990 U.S.App.LEXIS 3375 (7th Cir. 1990) 11

Tri-Crown, Inc. v. American Fed. Savings & Loan Ass'n, 1990 U.S.App.LEXIS 11517 (10th Cir. 1990) 12

United States v. Spurgeon, 861 F.2d 181 (8th Cir. 1988) 11

Warfield v. Fidelity and Deposit Co., 904 F.2d 322 (5th Cir. 1990) 10

Williams v. Giant Eagle Mkts., Inc., 883 F.2d 1184 (3d Cir. 1989) 10

Williams v. Mason, 883 F.2d 76 (6th Cir. 1989) . . . 10

TABLE OF STATUTES

28 U.S.C. § 1254(1) 3

28 U.S.C. § 2101(c) 3

28 U.S.C. § 1331 5

Employee Retirement Income Security Act of 1974, *as amended*, 29 U.S.C. §§ 1001 *et seq* 5

ERISA Section 502(e)(1) and (f), 29 U.S.C. § 1132(e)(1) and (f) 5

TABLE OF FEDERAL RULES

Rule 3(c) of the Federal Rules of Appellate Procedure . . . . . i, 3, 7-9

Rule 10(a) of the Federal Rules of Civil Procedure 3, 15

Rule 54(b) of the Federal Rules of Civil Procedure 4, 6, 15

Rule 60 of the Federal Rules of Civil Procedure 6

TABLE OF OTHER AUTHORITIES

Black's Law Dictionary (5th Ed., 1979) 14

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

No. _____

BETTY JO MAYESKE, BETTY ANN MORRISON, SHAVANA MARGARET KING, AND CHARLES DAVID MARTIN (deceased) by and through his representative, CHARLES LINER,

Petitioners,

v.

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS OFFICERS RETIREMENT PLAN, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS STAFF REPRESENTATIVES PENSION PLAN, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS EMPLOYEES' PENSION PLAN, ALFRED K. WHITEHEAD, ELLIOTT HASTINGS, JAMES McGOWAN, DANIEL EBERHART AND JOHN A. GANNON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioners, Betty Jo Mayeske, Betty Ann Morrison, Shavana Margaret King, and Charles David

Martin (deceased) by and through his representative, Charles Liner, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case dismissing three of the four appellants, Betty Ann Morrison, Shavana Margaret King and Charles David Martin, from the appeal.

OPINIONS BELOW

The final decision of the United States Court of Appeals for the District of Columbia Circuit on the merits is reported at 905 F.2d 1548, and is reproduced at App. 5a. The Judgment of the court of appeals is reproduced at App. 74a. The order of the United States Court of Appeals for the District of Columbia Circuit dismissing three of the four appellants is not reported, and is reproduced in the Appendix hereto at App. 1a. The decision of the United States Court of Appeals for the District of Columbia Circuit denying Appellants' request for rehearing is unreported and reproduced at App. 3a. The decision of the court of appeals denying the companion appeal is unreported and is reproduced at App. 29a. The decision of the court of appeals denying Appellants' motion to consolidate the two appeals is unreported and is reproduced at App. 27a. The decision of United States District Court for the District of Columbia granting Defendants' Motion for Summary Judgment also unreported, and is reproduced at App. 32a. That court's judgment is reproduced at App. 31a. The district court's memorandum and order denying Plaintiffs' Motion to Amend Judgment is unreported and is reproduced at App. 71a.

JURISDICTION

The Court of Appeals entered a partial dismissal of the appeal on September 22, 1989 (reproduced at App. 1a), and denied rehearing with regard to that partial dismissal on December 5, 1989 (reproduced at App. 3a). The Judgment of the Court of Appeals for the District of Columbia Circuit was entered on June 8, 1990, and is reproduced at App. 74a. On the same day, the court filed its final decision on the merits. App. 5a. No petition for rehearing was filed. This Petition is timely filed with this Court under 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULES INVOLVED

Rule 3(c) of the Federal Rules of Appellate Procedure provides:

> **(c) Contents of the Notice of Appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

Rule 10(a) of the Federal Rules of Civil Procedure provides:

> (a) **Caption; Names of Parties.** Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

Rule 54(b) of the Federal Rules of Civil Procedure provides:

> (b) **Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any

time before the entry of judgment adjudicating all the claims and rights and liabilities of all the parties.

STATEMENT OF THE CASE

This action was brought under the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* Therefore, the district court had jurisdiction pursuant to 28 U.S.C. § 1331 and ERISA Section 502(e)(1) and (f), 29 U.S.C. § 1132(e)(1) and (f).

The facts leading to this action arose out of the long-time employment of the four Petitioners (the "Employees") by the International Association of Fire Fighters to operate a federally funded educational program. As alleged below, the various defendants in the district court (collectively referred to as the "IAFF") sought to deny the Employees their rights under the terms of the IAFF's various pension plans.[1] When the Employees made further inquiries regarding their rights (including a request for plan documents), the IAFF commenced a program of retaliation, culminating in the cancellation of the educational program, and the termination of the jobs of each of the Employees.

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[1]In addition to their rights asserted under the terms of the various plans, the Employees also alleged that monies to pay for their accrued pension benefits had been provided by the federal government in its funding of the educational program, but that the IAFF had wrongfully converted these amounts for its own benefit.

On November 28, 1986, the Employees commenced this action in the United States District Court for the District of Columbia. Each of the four Employees asserted the same allegations and claims, sought the same relief below, and were represented by the same counsel. All of the Defendants were represented by the same opposing counsel.

On March 30, 1989, the district court (Hon. Royce C. Lamberth) issued its Memorandum Opinion and Judgment, finding for the IAFF on all counts. The judgment did not refer to any of the Plaintiffs individually, using the term "plaintiffs" only, with no further explication. App. 31a. On April 11, 1989, Plaintiffs filed a timely Notice of Appeal, stating "Plaintiffs Betty Jo Mayeske, *et al.* ... hereby appeal ...." (The notice of appeal is reproduced in its entirety at App. 76a.)

After Plaintiffs' appeal was docketed, the IAFF moved the Court of Appeals to dismiss all appellants not individually named in the Notice of Appeal.[2] The Court of Appeals granted the IAFF's Motion and dismissed Plaintiffs Morrison, King and Martin from the appeal on the ground that they had not been separately named in the notice of appeal. The panel concluded that the notice of appeal was deficient under Federal Rule of Appellate

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[2]Plaintiffs opposed the motion, and also filed a Motion with the district court to amend the judgment pursuant to Rules 54(b) and 60 of the Federal Rules of Civil Procedure. That Motion was denied on September 8, 1990. App. 71a. Plaintiffs appealed the denial (C.A. No. 89-7233). That appeal was dismissed on February 5, 1990. App. 27a.

Procedure 3(c) because the designation "Plaintiffs Betty Jo Mayeske, *et al.*" did not provide adequate notice of the parties appealing. The panel relied on *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) and *District of Columbia Nurses' Assn. v. District of Columbia*, 854 F.2d 1448 (D.C. Cir. 1988)(*per curiam*) in ruling on the issue. Appellants filed a petition for rehearing and suggestion for rehearing *en banc*, which was denied.

On June 8, 1990, the court of appeals issued its decision on the merits of the action. This decision reversed the finding underlying the district court's decision, vacated the judgment, and remanded for further proceedings. On that same day, the court entered its judgment, remanding the case to the district court.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the District of Columbia Circuit in this case is in conflict with decisions of other circuits. At the heart of this split is the important question of federal law left unresolved by *Torres*.

Following this Court's decision in *Torres*, the courts of appeal have split three ways with regard to the formal requirements applicable to a notice of appeal. Specifically, the split has centered on what constitutes the "functional equivalent" of expressly naming individual litigants in a notice of appeal.

As a result of this split, and of an excessively harsh construction given to Rule 3(c) of the Federal Rules of Appellate Procedure following the *Torres* decision, many

of the courts of appeal have imposed an undue and unjustified procedural obstacle to appeals on the merits. The net result has been to deny justice to unwary litigants; to create uncertainty for litigants and the courts; to impose a substantial additional burden upon appellate courts; and to unreasonably elevate form over substance.

A. THE DECISION IN *TORRES*

In *Torres*, this Court considered the case of a group of litigants who sought to appeal an adverse district court decision. Their notice of appeal purportedly set out an exhaustive list of appellants. The list, however, inadvertently excluded one of the parties to the district court action. The Court concluded that the litigant who was not named or otherwise identified in the notice of appeal was not a party to the appeal.

The Court based its decision on the holding that compliance with the requirements of Rule 3(c) of the Federal Rules of Appellate Procedure constitutes a "jurisdictional threshold." *Torres*, 487 U.S. at 315. The Court went on to reconcile this jurisdictional requirement with its prior holding that "the rules of civil procedure should be liberally construed and that 'mere technicalities' should not stand in the way of consideration of a case on its merits." *Torres*, 487 U.S. at 316, *citing*, *Foman v. Davis*, 371 U.S. 178, 181 (1962).

To this end, the Court adopted a rule that "a court may ... find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires." *Torres*, 487 U.S. at 317. On the facts before it, however, the Court concluded that the omitted

litigant was "never named or otherwise designated, however inartfully, in the notice of appeal...." *Torres*, 487 U.S. at 317.

The Court specifically rejected the petitioners' argument that the use of "*et al.*" in the caption provided adequate notice of the parties' intent to appeal. Rather, the Court concluded that this usage did not give "fair notice of the specific individual or entity seeking to appeal. *Torres*, 487 U.S. at 318.

In the end, although the Court ruled that the jurisdictional threshold of Rule 3(c) is overcome if the notice of appeal includes the "functional equivalent" of a designation of the appellants, it left unsettled the question of what constitutes "functional equivalence."

B. THE AFTERMATH OF *TORRES*

Subsequent to this Court's decision in *Torres*, no fewer than 80 cases have arisen in which would-be appellants have faced dismissal for failure to expressly name the individuals involved.[3] Moreover, because, as in

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[3]*Marin-Piazza v. Aponte-Roque*, 902 F.2d 32 (1st Cir. 1990); *Rosario-Torres v. Hernandez-Colon*, 889 F.2d 314 (1st Cir. 1989); *In Re San Juan Dupont Plaza Hotel Fire Litig.*, 888 F.2d 940 (1st Cir. 1989); *Mariani-Giron v. Acevedo-Ruiz*, 877 F.2d 1114 (1st Cir. 1989); *Jusino v. Zayas*, 875 F.2d 986 (1st Cir. 1989); *In Re Grand Jury Proceedings*, 875 F.2d 927 (1st Cir. 1989); *Kaiser v. Armstrong World Indus. Inc.*, 872 F.2d 512 (1st Cir. 1989); *Gonzalez-Vega v. Hernandez-Colon*, 866 F.2d 519 (1st Cir. 1989); *Santos-Martinez v. Soto-Santiago*, 863 F.2d 174 (1st Cir. 1988); *Baylis v. Marriott Corp.*, 906 F.2d 874 (2d Cir. 1990); *Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060 (2d Cir. 1989); *Shatah v. Shearson/American Express*,

Inc., 873 F.2d 550 (2d Cir. 1989); *De Luca v. Long Island Lighting Co.*, 862 F.2d 427 (2d Cir. 1988); *Masquerade Novelty, Inc. v. Unique Industries, Inc.*, ___ F.2d ___, 1990 U.S.App.LEXIS 15120 (3d Cir. 1990); *Cruz v. Melendez*, 902 F.2d 232 (3d Cir. 1990); *In Re Highway Truck Drivers Local 107*, 888 F.2d 293 (3d Cir. 1989); *Dura Systems, Inc. v. Rothbury Inv., Ltd.*, 886 F.2d 551 (3d Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 844 (1990); *Williams v. Giant Eagle Mkts., Inc.*, 883 F.2d 1184 (3d Cir. 1989); *Kowaleski v. Director, Office of Workers' Compensation Programs*, 879 F.2d 1173 (3d Cir. 1989); *Warfield v. Fidelity and Deposit Co.*, 904 F.2d 322 (5th Cir. 1990); *Birdsong v. Wrotenbery*, 901 F.2d 1270 (5th Cir. 1990); *Mikeska v. Collins*, 900 F.2d 833 (5th Cir. 1990); *Griffith v. Johnston*, 899 F.2d 1427, *reh'g denied*, 904 F.2d 705 (5th Cir. 1990); *May v. Houston Post Pension Plan*, 898 F.2d 1068 (5th Cir. 1990); *McLemore v. Landry*, 898 F.2d 996 (5th Cir. 1990), *petition for cert. filed* (July 23, 1990, No. 90-151); *Brotherhood of Ry. Carmen v. Atchison, Topeka & Santa Fe Ry. Co.*, 894 F.2d 1463 (5th Cir. 1990), *petition for cert. filed* (June 28, 1990, No. 90-17); *Barnett v. Petro-Tex Chem. Corp.*, 893 F.2d 800, *reh'g denied*, 1990 U.S.App.LEXIS 4465, *cert. denied*, ___ U.S. ___, 100 S.Ct. 3274 (1990); *Browning v. Navarro*, 894 F.2d 99 (5th Cir. 1990); *Rendon v. AT & T Technologies*, 883 F.2d 388 (5th Cir. 1989); *Mylett v. Jeane*, 879 F.2d 1272, *reh'g denied*, 1989 U.S.App.LEXIS 15581 (5th Cir. 1989); *Pope v. Miss. Real Estate Comm'n.* 872 F.2d 127 (5th Cir. 1989); *King v. Otasco, Inc.*, 861 F.2d 438 (5th Cir. 1988); *Smith v. White*, 857 F.2d 1042 (5th Cir. 1988); *Alsup v. Int'l Union of Bricklayers and Allied Craftsmen, Local 3*, 1990 U.S.App.LEXIS 8410 (6th Cir. 1990); *Minority Employees of Tenn. Dep't of Employment Sec., Inc., v. Tenn. Dep't of Employment Sec.*, 901 F.2d 1327 (6th Cir. 1990), *petition for cert. filed* (July 25, 1990, No. 90-169); *Chivas Prods. Ltd. v. Owen*, 902 F.2d 32 (unpublished decision at 1990 U.S.App.LEXIS 6745) (6th Cir. 1990); *Cox v. Seabold*, 898 F.2d 153 (6th Cir. 1990); *Heussner v. National Gypsum Co.*, 887 F.2d 672, *reh'g denied*, 1989 U.S.App.LEXIS 19804 (6th Cir. 1989), *reh'g denied*, 1990 U.S.App.LEXIS 10115 (6th Cir. 1990); *Williams v. Mason*, 883 F.2d 76 (6th Cir. 1989); *Jenkins v. Comm'r of Internal Revenue*, 880 F.2d 414 (unpublished decision at 1989 U.S.App.LEXIS 11115) (6th Cir. 1989); *Police Officers for Equal Rights v. Columbus*,

871 F.2d 1088 (unpublished decision at 1989 U.S.App.LEXIS 3729) (6th Cir. 1989); *Beale v. Cain*, 869 F.2d 1488 (unpublished decision at 1989 U.S.App.LEXIS 1931) (6th Cir. 1989); *Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989)(*overruled by Minority Employees of Tenn. Dep't of Employment Sec., Inc. v. Tenn. Dep't of Employment Sec.*, 901 F.2d 1327 (6th Cir. 1990)); *Holt v. Norris*, 865 F.2d 258 (unpublished decision at 1988 U.S.App.LEXIS 17113) (6th Cir. 1988); *McCuaig v. Brown*, 859 F.2d 152 (unpublished decision at 1988 U.S.App.LEXIS 13081) (6th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1169 (1989); *Bryant v. Int'l Fruit Prod. Co.*, 859 F.2d 152 (unpublished decision at 1988 U.S.App.LEXIS 12868) (6th Cir. 1988); *Armistead v. Sullivan County Jail*, 856 F.2d 192 (unpublished decision at 1988 U.S.App.LEXIS 11946) (6th Cir. 1988); *Barnett v. Stern*, 1990 U.S.App.LEXIS 13171 (7th Cir. 1990); *Baucher v. Eastern Indiana Prod. Credit Ass'n*, 906 F.2d 332 (7th Cir 1990); *Allison v. Ticor Title Ins. Co.*, 1990 U.S.App.LEXIS 11927 (7th Cir. 1990); *Lingamneni v. Board of Governors of State Colleges & Univs.*, 1990 U.S.App.LEXIS 9640 (7th Cir. 1990); *Triad Assocs., Inc. v. Chicago Hous. Auth.*, 1990 U.S.App.LEXIS 3375 (7th Cir. 1990); *Chicago Truck Drivers Union Pension Fund v. Louis Zahn Drug Co.*, 890 F.2d 1405 (7th Cir. 1989); *FTC v. Amy Travel Serv., Inc.*, 894 F.2d 879 (7th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 366 (1989); *Bigby v. Chicago*, 871 F.2d 54 (7th Cir. 1989); *Robinson v. Chicago*, 868 F.2d 959, *reh'g denied*, 1989 U.S.App.LEXIS 7032 and 7033 (7th Cir. 1989), *cert. dismissed*, ___ U.S. ___, 110 S.Ct 708, and *cert. denied*, ___ U.S. ___, 110 S.Ct. 756 (1990); *Arnow v. United States Nuclear Regulatory Comm'n*, 868 F.2d 223 (7th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 61 (1989); *Akins v. Board of Governors of the State Colleges & Univs.*, 867 F.2d 972 (7th Cir. 1988); *Rogers v. National Union Fire Ins. Co.*, 864 F.2d 557 (7th Cir. 1988); *Allen Archery, Inc. v. Precision Shooting Equip., Inc.*, 865 F.2d 896 (7th Cir. 1989); *Goos v. ICC*, ___ F.2d ___, 1990 U.S.App.LEXIS 14707 (8th Cir. 1990); *Madewell v. Roberts*, 1990 U.S.App.LEXIS 12847 (8th Cir. 1990); *In Re Kerr*, 1990 U.S.App.LEXIS 12019 (8th Cir. 1990); *Manis v. Sterling*, 862 F.2d 679 (8th Cir. 1988); *United States v. Spurgeon*, 861 F.2d 181 (8th Cir. 1988); *McMichael v. United States*, 856 F.2d 1026 (8th Cir. 1988); *Chicano Educ. & Manpower Servs. v. United States Dep't*

the instant case, the dismissal in many of these cases will have been issued in an unpublished memorandum prior to the ultimate, published, resolution of the case, the true number of affected cases cannot be accurately determined. It may be far greater, even many times greater, than the number that can be easily discerned.

C. SPLIT IN THE CIRCUITS

The many decisions issued by the courts of appeal have varied greatly. In general, they may be said to follow three different paths.

Several circuits have construed *Torres*, in essence, as having adopted the "strict construction" rule advocated

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of Labor, 1990 U.S.App.LEXIS 12480 (9th Cir. 1990); *Nevada Highway Patrol Ass'n v. Nevada*, 899 F.29 1549 (9th Cir. 1990); *National Center for Immigrants' Rights, Inc. v. INS.*, 892 F.2d 814 (9th Cir. 1990); *Graves v. Raypak, Inc.*, 891 F.2d 254 (9th Cir. 1989), *withdrawn* (February 2, 1990); *Johnson v. Trustees of Western Conference of Teamsters Pension Trust Fund*, 879 F.2d 651 (8th Cir. 1989); *Kim v. Fujikawa*, 871 F.2d 1427 (9th Cir. 1989); *Abatti v. Comm'r of IRS*, 859 F.2d 115 (9th Cir. 1988); *Meehan v. Los Angeles*, 856 F.2d 102 (9th Cir. 1988); *Aetna Life Ins. Co. v. Alla Medical Servs., Inc.*, 855 F.2d 1470 (9th Cir. 1988); *Tri-Crown, Inc. v. American Fed. Savings & Loan Ass'n*, 1990 U.S.App.LEXIS 11517 (10th Cir. 1990); *Crabtree v. Muchmore*, 904 F.2d 1475 (10th Cir. 1990); *In re Woosley*, 855 F.2d 687 (10th Cir. 1988); *Cotton v. U.S. Pipe & Foundry Co.*, 856 F.2d 158, *reh'g denied*, 861 F.2d 1281 (11th Cir. 1988); *Mayeske v. Int'l Ass'n of Fire Fighters*, 905 F.2d 1548 (D.C. Cir. 1990); *Obadele v. Thornburg*, 876 F.2d 1008 (unpublished decision at 1989 U.S.App.LEXIS 7816) (D.C. Cir. 1989); *District of Columbia Nurses' Ass'n v. District of Columbia*, 854 F.2d 1448 (D.C. Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3189 (1989).

by Justice Scalia in his concurrence. *Torres*, 487 U.S. at 319. These courts have for all practical purposes rejected this Court's rule of "functional equivalence," permitting appeals only of parties expressly named.[4] On the other hand, some courts have adopted a broader construction, permitting some deviation from an actual naming requirement.[5]

Finally, the Court of Appeals for the Ninth Circuit has construed *Torres* to permit an appeal where the notice "fairly indicates that *all* and not just *some* of the defendants are appealing the decision below." *National Center for Immigrants' Rights, Inc. v. I.N.S.*, 892 F.2d 814, 816 (9th Cir. 1990) (emphasis in original). In *National Center*, the notice of appeal had stated only that "Notice is hereby given that defendants in the above referenced action hereby appeal...." 892 F.2d at 815. The court concluded that the designation of "defendants" indicated all defendants, and that had the appeal been meant only to apply to some, it would have designated "[c]ertain defendants...." *National Center*, 892 F.2d at 817. Under this standard, the designation in the instant notice of appeal would unquestionably have been sufficient.

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[4]The courts appearing to adopt this rigid construction rule include the sixth circuit (*e.g.*, *Minority Employees of Tenn.*, 878 F.2d at 1436), the seventh circuit (*e.g.*, *Baucher*, 906 F.2d at 333-34), the eleventh circuit (*e.g.*, *Cotton*, 856 F.2d at 161), and the District of Columbia circuit (*e.g.*, *Mayeske*, App. 5a, infra.).

[5]Among these courts are the fifth circuit (*e.g.*, *Griffith*, 899 F.2d at 1430), and the tenth circuit (*e.g.*, *Tri-Crown, Inc.*, 1990 U.S.App.Lexis 11517, 2-3).

The result of this three-way split among the circuits is to create tremendous uncertainty regarding the requirements for naming parties in notices of appeal. Thus, a notice of appeal found adequate in the ninth, or even the fifth, circuit, may be found inadequate, and a basis for dismissal of parties, in the District of Columbia circuit.[6]

D. THE CAPTION RULE

To further add to the growing confusion and uncertainty, some courts look to the caption for the identity of the appealing parties. The courts that have adopted this "caption rule" rely upon the standard identification used in the caption (*i.e.*, the name of the first party followed by *et al.*) to permit an appeal by the first named party, even if

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[6] While the conclusion in *Torres* that the use of "*et al.*" in a caption cannot expand upon a purportedly exhaustive listing of would-be appellants contained in the body of a notice of appeal is undoubtedly correct, the Court's discussion of the meaning of that Latin phrase denies its commonly understood meaning. For example, as defined in Black's Law Dictionary (5th Ed., 1979), *et al.* means:

> An abbreviation for *et alii*, "and others." ... Where the words "et al." are used in a judgment against defendants, the quoted words include *all defendants.*" (*Citations omitted, emphasis added.*)

Despite the ordinary usage of the phrase "*et al.*" to mean "and all others," the Court's abbreviated discussion of its meaning, made without the benefit of briefing by the parties, has resulted in a general foreclosure in the lower courts of any real examination of the meaning of this critical phrase. Such an important conclusion requires a deeper examination of the meaning of this expression.

no names are used in the body of the appeal.[7] Presumably, these courts are motivated by a desire to at least partially mitigate the harsh result of their rigid construction of *Torres* by permitting one party to an appeal, even while dismissing the rest.

What these cases do not discuss is the fact that a notice of appeal, while described in the Federal Rules of Appellate Procedure, is in fact filed in the district court and is therefore subject to the district court's rules. Pursuant to Rule 10(a) of the Federal Rules of Civil Procedure, the caption of a district court pleading must list at least "the name of the first party on each side with an appropriate indication of other parties."

Consequently, these courts have further compounded the confusion now surrounding construction of notices of appeal by relying upon the contents of a caption, which in fact does no more than demonstrate compliance with Rule 10(a).[8]

E. JUDGMENT NOMENCLATURE

A further inconsistency has resulted as well. In cases involving multiple parties, Rule 54(b) of the Federal Rules of Civil Procedure requires a district court to designate whether the judgment extends to all, or to fewer

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[7]*E.g.*, *Rosario-Torres*, 889 F.2d at 317; *but see*, *Bigby*, 871 F.2d at 56-57.

[8]By contrast, the use of "*et al.*" in the body of the notice of appeal is not a creature of the district court rules, and constitutes an attempt to denominate, however inartfully, each of the remaining parties.

than all of the parties. In the instant case, however, the judgment indicated only that it extended to "plaintiffs." App. 31a. Such shorthand references, however, are both universally used by courts, and understood by litigants and courts alike to include all plaintiffs, unless otherwise specifically indicated. By the same logic, a similar shorthand in a notice of appeal, or other legal document or pleading, is universally understood to include all plaintiffs, unless specifically limited. To conclude otherwise is to place into question the validity and finality of a myriad of district court judgments.[9]

F. DENIAL OF JUSTICE

Despite the narrow facts of *Torres*, the generally expansive and preclusive reading of its holding by the courts of appeal (with the exception of the ninth circuit) has resulted in the denial of substantial justice to hundreds, and perhaps more, litigants. In so doing, those courts have narrowed the holding in *Foman*, and the retention in *Torres* of the "functional equivalence" rule, to virtual irrelevance.

Thus, despite the use in notices of appeal of the clearly understood, and universally recognized, formula of the plural designation of a party's status (*i.e.*, plaintiffs or defendants), followed by the name of the first party, followed by "*et al.*" to mean all parties with the same status, litigants have been barred from pursuing their

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[9]*See, e.g., Kam Koon Wan v. E.E. Black, Ltd.*, 182 F.2d 146, 148 (9th Cir. 1950) (judgment that did not specify that it applied to all parties was not final).

appeals.[10] Moreover, as demonstrated by the proliferation of cases in which this issue has been raised, the "bright-line test" advocated by Justice Scalia and adopted by the majority of the courts of appeal has not resulted in either greater certainty or predictability. *Torres*, 487 U.S. at 324, fn. (Brennan, J., dissent.) Rather, it has created a trap for unwary litigants, which appears to continue without abatement.

G. JUDICIAL ECONOMY

Besides having the effect of denying substantial justice, this Court's decision in *Torres* has resulted in a virtual inundation of the courts of appeal with motions to dismiss. (*See* fn. 3, *infra.*) Moreover, this additional judicial activity has not resulted in any concomitant benefit to the courts. In almost every such case, despite the dismissal of parties to an appeal, at least one party remained to continue the appeal. Thus, the only result of the strict construction attributed to the *Torres* decision has been an increase in the judicial workload.

The resulting partial dismissals have also resulted in an unequitable imposition of the entire cost and burden of maintaining an appeal on a single litigant, instead of upon the entire group of litigants for whose benefit the appeal

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[10]The argument that, because in some cases, "*et al.*" is used to indicate fewer than all parties with the same status, it creates an ambiguity, is incorrect. Any expression can be misused. The mere fact that an expression is sometimes used in a manner contrary to its generally understood meaning is not reason to reject any use of that expression.

was originally sought. Clearly, these are not the results contemplated by the Rules, nor by this Court.

CONCLUSION

For the reasons stated herein, this petition should be granted.

Respectfully Submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-7104

Betty Jo Mayeske, *et al.*,

Appellants

v.

The International Association of Fire Fighters, *et al.*,

Appellees.

BEFORE: Wald, Chief Judge; Silberman and Williams, Circuit Judges

Filed September 22, 1989

ORDER

Upon consideration of appellees' motion to dismiss the appeal of all plaintiffs not named in the notice of appeal, appellants' opposition thereto and appellees' reply,

and appellant's motion for leave to permit the district court to amend its judgment, it is

ORDERED that the motion to dismiss the appeal of all plaintiffs not named in the notice of appeal be granted. Fed. R. App. P. 3(c) states that the notice of appeal shall specify the party or parties taking the appeal. The Supreme Court has strictly applied this rule and has determined that the use of the term "*et al.*" utterly fails "to provide notice both to the opposition and to the court of the identity of the appellant or appellants." *Torres v. Oakland Scavenger Co.*, 108 S.Ct. 2405, 2409 (1988). *See also Appeal of District of Columbia Nurses' Assn. (Battle, et al. v. District of Columbia)*, 854 F.2d 1448 (D.C. Cir. 1988) (*per curiam*). Since the notice of appeal does not specifically identify whether Betty Ann Morrison, Shavana Margaret King, and Charles David Martin are appellants, this appeal must be dismissed as to those individuals. It is

FURTHER ORDERED that appellants' motion for leave to permit the district court to amend its judgment be denied. The district court does not need appellate approval to rule on a motion filed pursuant to Fed. R. Civ. P. 60(b). *See* Fed. R. Civ. P. 60(b) (a motion filed pursuant to Rule 60(b) may be filed within a year after the entry of judgment).

The Clerk is directed to withhold issuance of the mandate herein until resolution of the remainder of the appeal.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-7104

Betty Jo Mayeske, *et al.*,

Appellants

v.

The International Association of Fire Fighters, *et al.*,

Appellees.

BEFORE: Wald, Chief Judge; Silberman and Williams, Circuit Judges

Filed December 5, 1989

ORDER

Upon consideration of appellant's petition for rehearing and suggestion for rehearing *en banc*, it is

ORDERED that appellant's petition be denied.

The three cases relied upon by appellant to support a limited application of *Torres v. Oakland Scavenger Co.*, 108 S.Ct. 2405, 2407 (1988) are distinguishable from the instant case. In *Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989), appeal was permitted by defendants who were unnamed in the notice of appeal because the notice stated that the appeal was taken by "the" defendants, meaning all defendants. In the instant case, no such article was used and thus it is unclear whether one or more of the four plaintiffs is appealing, especially in view of the fact that one of the four plaintiffs died prior to judgment. *Pope v. Mississippi Real Estate Commission*, 872 F.2d 127 (5th Cir. 1989) is also distinguishable from this case. *Pope* involved only two plaintiffs and therefore the use of the term "*et al.*" and "plaintiffs" clearly referred to both parties. Finally, *King v. Otasco*, 861 F.2d 438 (5th Cir. 1988) is distinguishable because it did not concern the omission of a party from a notice of appeal, but rather involved a party's failure to designate all of the capacities in which the party brought suit.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-7104

BETTY JO MAYESKE,

Appellant

v.

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS OFFICERS RETIREMENT PLAN, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS STAFF REPRESENTATIVES PENSION PLAN, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS EMPLOYEES' PENSION PLAN, ALFRED K. WHITEHEAD, ELLIOTT HASTINGS, JAMES MCGOWAN, DANIEL EBERHART, AND JOHN A. GANNON,

Appellees

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 86-3283)

Argued March 19, 1990

Decided June 8, 1990

Paul A. Green, with whom *Marilyn L. Baker* was on the brief, for appellants.

Erick J. Genser, with whom *Thomas A. Woodley* was on the brief, for appellees.

Before: WALD, *Chief Judge*, and RUTH B. GINSBURG and THOMAS, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* THOMAS.

THOMAS, *Circuit Judge:* Appellant Betty Jo Mayeske formerly worked as the director of the Open Learning Fire Service Program, an educational effort conducted from 1978 to 1986 by the International Association of Fire Fighters (IAFF). A dispute over Mayeske's pension rights has given rise to this suit, in which Mayeske[1] seeks recovery on several ERISA-based[2]

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[1]This action originally had four plaintiffs: Mayeske and the three members of her Open Learning Program staff. In giving notice of their appeal, the plaintiffs' attorney listed the appellants as 'Plaintiffs Betty Jo Mayeske, et al.' Last September, this court dismissed the three staff members from the appeal, relying on *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317-18 (1988), in which the Supreme Court held that 'et al.' does not name parties to an appeal as specifically as rule 3(c) of the Federal Rules of Appellate Procedure requires. *Mayeske v. International Ass'n of Fire Fighters*, No. 89-7104, slip op. at 1 (D.C. Cir. Sept. 22, 1989); *see* Fed. R. App. P. 3(c) ("The notice of appeal shall specify the party or parties taking the appeal ...."). Mayeske's former coplaintiffs have repeatedly attacked their dismissal from this case, but have failed to overcome it. *See, e.g., Mayeske v. International Ass'n of Fire Fighters*, No. 89-7223, slip op. (D.C. Cir. Feb. 5, 1990) (summarily affirming district court's refusal to amend its judgment, which also listed plaintiffs as 'Betty Jo Mayeske, et al.'). Although the present opinion,

and common-law contract and tort theories. The decisive question is whether Mayeske was an IAFF employee. The district court, holding that Mayeske did not enjoy IAFF employee status, granted the IAFF's motion for summary judgment on all but one of Mayeske's claims and dismissed the remaining claim for lack of jurisdiction. Because we hold that Mayeske was in fact an IAFF employee, we vacate and remand the judgment.

I. BACKGROUND

The IAFF is a union that represents over 170,000 paid firefighters in the United States and Canada. In 1977, the IAFF sought and received a federal grant to study higher-education opportunities for firefighters. The IAFF hired Mayeske, who was then the director of the University of Maryland's Open University Division, to conduct the study. A year later, the IAFF received another federal grant and created the Open Learning Program, which offered firefighters non-campus-bound courses and degree programs. Mayeske became the Open Learning Program's full-time director in 1978; over the next several years, she hired a three-person staff. In response to annual proposals written by the Open Learning Program staff and reviewed and submitted by top IAFF officers, the Federal Emergency Management Agency (FEMA) granted funds for the Program through November 1986, when the IAFF declined to seek further FEMA grants.

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for the sake of accuracy, often refers to 'Mayeske and her staff,' only Mayeske is now a party to this appeal.

[2] *See* Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461.

Mayeske and her staff operated as a special unit within the IAFF, devoted entirely to the Open Learning Program. Nearly all of the Open Learning Program's funding came from FEMA grants, although the record indicates that the IAFF subsidized the program in at least one year. See Memorandum from Loyd Kneale to David Martin (May 27, 1986) (discussing 'non-federal (IAFF) share" of Open Learning Program budget for 1985-1986), J.A. at A448. As is typical under negotiated government contracts, FEMA retained significant power to oversee Mayeske's and her staff's work. Each IAFF proposal for the Open Learning Program specified tasks and costs in detail, and each resulting 'Cooperative Agreement' imposed a detailed statement of work. In addition, two FEMA officials had the right to monitor the Program's spending and performance and to audit the Program if desired.

Notwithstanding their group's distinct mission, Mayeske and her staff were in most respects treated like IAFF employees. They occupied offices at the IAFF's Washington, D.C., headquarters; the district court characterized these offices as "separate from, though physically collocated with, the IAFF offices.' *Mayeske v. International Ass'n of Firefighters*, No. 86-3283, slip op. at 6 (D.D.C. Mar. 30, 1989). The IAFF paid Mayeske and her staff with IAFF checks. It listed itself on many personnel forms as Mayeske's and her staff's employer. Finally, it subjected Mayeske and her staff to the IAFF's personnel policies on hours of work, attendance and leave, discipline, and grievances.

The record indicates, moreover, that the IAFF officers treated the Open Learning Program as just another

function within the IAFF. The IAFF's literature frequently reported on the Open Learning Program's progress and hailed the efforts of the 'IAFF's Open Learning staff, directed by Dr. Betty Jo Mayeske." Eg., International Ass'n of Fire Fighters, Officers' Report 18 (Aug. 4-8, 1986), J.A. at A404. This literature also noted how the Open Learning Program served the IAFF's broader goals. *See, e.g., id.* at 20 ('The Open Learning program is relevant to our purpose of increasing benefits for our members.... We plan to insure that the OLFSP thrives because this project is important to our members and the future of our profession.'), J.A. at A406. The record shows that the IAFF's President, John A. Gannon, dealt with Mayeske as he would deal with the head of any IAFF department. *See, e.g.*, Memorandum from John A. Gannon to Ted Kastelic at 1 (July. 9, 1985) ("I want it clearly understood that Betty Jo Mayeske's salary shall not exceed the salary of the other IAFF Department Directors...."), J.A. at A407; Memorandum from John A. Gannon to All Employees of the IAFF Washington Office at 1 (July 10, 1981) (establishing new "structure of the IAFF office"; listing Open Learning Program as one of ten departments reporting to the Assistant to the President), J.A. at A364. When Gannon issued Mayeske a directive concerning her staffs pay, moreover, Mayeske responded as a subordinate manager would: she assured Gannon that "[t]he budget ha[d] been changed per [his] order." Memorandum from B.J. Mayeske to President Gannon at 1 (July 16, 1985), J.A. at A408.

The events that precipitated this lawsuit began in early 1985, when IAFF officers were advised that the union's pension plans might be violating an antidiscrimination provision of the Internal Revenue Code,

26 U.S.C. § 410(b)(1),[3] and that the plans were in danger of losing their tax-exempt status. The officers were concerned that the Internal Revenue Service might decide that "grant employees," such as Mayeske, were IAFF employees for section 410(b) purposes. Since the IAFF had denied pension coverage to all grant employees, *see, e.g.*, Affidavit of Betty Jo Mayeske at 2 (Dec. 17., 1987), J.A. at A547, the officers saw a possibility that the IAFF's plans would cover too low a percentage of employees, thus contravening the antidiscrimination rule. Instead of offering pension coverage to Mayeske and other grant employees or seeking a ruling from the IRS, the IAFF

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[3]The present version of section 410(b)(1) reads, in pertinent part:

> A trust shall not constitute a qualified trust under section 401(a) unless such trust is designated by the employer as part of a plan which meets 1 of the following requirements:
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> (A) The plan benefits at least 70 percent of employees who are not highly compensated employees.
>
> (B) The plan benefits --
>
> (i) a percentage of employees who are not highly compensated employees which is at least 70 percent of
>
> (ii) the percentage of highly compensated employees benefiting under the plan.
>
> (C) The plan meets the requirements of paragraph (2)[, which establishes an "average benefit percentage test"].

26 U.S.C. § 410(b)(1) (amended 1986).

tried to take advantage of 26 U.S.C. § 410(b)(3)(A),[4] which permits employers to exclude from the antidiscrimination test any employees whose pension benefits are included in a collective bargaining agreement. In late spring 1986, the officers tried to convince a unit of the Office and Professional Employees International Union to represent Mayeske and her staff for the limited purpose of bargaining over fringe benefits, including pension benefits. When that union refused, the officers asked Mayeske and her staff to sign an "Agreement Establishing the Association of IAFF Grant Employees" and to collectively bargain with the IAFF over fringe benefits.[5] Mayeske and her staff declined to sign the agreement and sought legal advice.

Shortly thereafter, a lawyer representing Mayeske and her staff requested, in writing, that IAFF President Gannon provide a copy of the IAFF's pension plans and related documents. In response, Gannon told Mayeske that

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[4]Subsection 410(b)(3)(A) provides:

> For purposes of this subsection, there shall be excluded from consideration -
>
> > (A) employees who are included in a unit of employees covered by an agreement which the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers, if there is evidence that retirement benefits were the subject of good faith bargaining between such employee representatives and such employer or employers[.]

[5]To pursue this solution, the IAFF had to assume that, at least for purposes of subsection 410(b)(3)(A), Mayeske and her staff were IAFF employees.

he would not provide the documents, and that she had no pension rights. A later, similar request, sent to the IAFF's General Counsel, drew the reply that Mayeske was not entitled to receive plan documents because she was not a participant in or a beneficiary of any IAFF pension plan. Over the following months, relations between Mayeske and the IAFF officers deteriorated. Mayeske alleges that the officers retaliated against her by downgrading her parking privileges, by prohibiting her from attending the IAFF's 1986 convention, and, ultimately, by ending the IAFF's sponsorship of the Open Learning Program. The IAFF, in contrast, offers innocent explanations for these actions. *See Mayeske,* No. 86-3283, slip op. at 11-12.'In any event, when the IAFF's involvement with the Open Learning Program ended, so did Mayeske's employment.

On November 29, 1986, Mayeske filed this action against the IAFF, its pension funds, and several IAFF officers.[6] She sought her accrued pension benefits, *see* 29 U.S.C. § 1132(a)(1)(B), as well as general damages and damages under ERISA for failure to provide pension plan information, *see id.* § 1132(c)(1)(B), retaliation, *see id.* § 1140, breach of fiduciary duty, *see. id.* § 1104(a)(1)(D), breach of the IAFF's contracts with FEMA, under which Mayeske claimed to be an intended third-party beneficiary, and conversion of FEMA payments that the IAFF reportedly should have been contributing to Mayeske's pension fund. The parties filed cross-motions for summary judgment. The district court granted the IAFF's motion and denied Mayeske's.

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[6]The discussion will refer to the defendants/appellees collectively as "the IAFF," since the analysis does not rely on any distinctions between the defendants/appellees.

In evaluating Mayeske's statutory claims, the district court, noting that ERISA, 29 U.S.C. § 1132(a), affords a claim for relief only to pension plan beneficiaries, fiduciaries, and participants, sought to determine whether Mayeske was a participant in any of the IAFF's pension plans. *Mayeske*, No. 86-3283, slip op. at 18-19. After properly stating that "'[p]articipant' within the statutory scheme of ERISA is a subset of the term 'employee,'" *id.* at 19, the court analyzed Mayeske's employment status with the IAFF. Because both ERISA, 29 U.S.C. § 1002(6), and the IAFF pension plans define "employee" in circular terms, the court turned to the common law. Applying the standards set out in *Holt v. Winpisinger*, 811 F.2d 1532 (D.C. Cir. 1987), the court held that Mayeske was an independent contractor of the IAFF, not an IAFF employee. *Mayeske*, No. 86-3283, slip op. at 21-23. It concluded that Mayeske "ha[d] no ERISA-related entitlements or protections with respect to any of the IAFF plans," *id.* at 23, and granted the defendants' motion for summary judgment on all of Mayeske's ERISA-based claims. Based on its assumption that Mayeske's remaining claims invoked District of Columbia law, the court refused to exercise pendent jurisdiction over those common-law claims, relying on *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966) ("[I]f the federal claims are dismissed before trial, ... the state claims should be dismissed as well."). *Mayeske*, No. 86-3283, slip op. at 34-35. Mayeske has appealed.

II. DISCUSSION

The summary judgment in favor of the IAFF rests on a flawed premise: that Mayeske was not the IAFF's employee. The district court properly determined that

parallel litigation before the National Labor Relations Board did not preclude the court from deciding that Mayeske was not an IAFF employee. And, in adjudicating the employment status issue, the court correctly held that the common law of agency, as explained in *Holt* and like cases, governs Mayeske's status with the IAFF. The district court, however, drew a faulty conclusion under the *Holt* standard.

A. Issue Preclusion

For almost as long as Mayeske's suit has been pending, the Open Learning Program staff has had an unfair-labor practices charge before the NLRB. *See, eg., International Ass'n of Firefighters,* 297 N.L.R.B. No. 146, slip op., 1989-1990 NLRB Dec. (CCH) ¶ 15,986 (Mar. 9, 1990) (supplemental decision after remand); *International Ass'n of Firefighters,* No. 5-CA-18,553, slip op. at 1 (Jan. 29, 1988) (ALJ's initial decision) (noting that charge was first filed on Dec. 15, 1986). Although a member of Mayeske's staff filed the charge, the charge makes claims regarding Mayeske's termination. *See, eg., International Ass'n of Firefighters,* No. 5-CA-18,553, slip op. at 1 (June 7, 1989)(ALJ's decision on remand). In evaluating its jurisdiction over the charge, the NLRB panel concluded that the IAFF was "the employer of these employees." *International Ass'n of Firefighters,* 292 N.L.R.B. No. 114, slip op. at 7, 1988-1989 NLRB Dec. (CCH) ¶ 15,465, at 29,028 (Feb. 10, 1989) (decision and order remanding proceeding). Mayeske contends that issue preclusion bars the courts from reexamining that conclusion. We disagree.

When an administrative adjudication resolves disputed issues, parties to the administrative case ordinarily

may not relitigate those issues in subsequent cases. *See United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966) (issue preclusion can apply to agencies' findings of fact); *Democratic Cent. Comm. v. Washington Metro. Area Transit Comm'n*, 842 F.2d 402, 409 (D.C. Cir. 1988) (applying issue preclusion analysis to agency's application of law to fact), *cert. denied*, 109 S.Ct. 870 (1989); *see also* Restatement (Second) of Judgments § 83(1) (1982) (making no distinction between resolutions of factual and legal issues by agencies).[7] Issue preclusion does not apply, however, when the issue decided by an earlier proceeding differs substantially from the issue at hand. *See, e.g., Pantex Towing Corp. v. Glidewell*, 763 F.2d 1241, 1245 (11th Cir. 1985); Restatement § 27 comment c.

In deciding, for jurisdictional purposes, whether Mayeske and her staff were IAFF employees, the NLRB focused on whether the IAFF, rather than FEMA, had authority to set their pay, benefits, and working conditions. See 292 N.L.R.B. No. 114, slip op. at 5-7, 1988-1989 NLRB Dec. (CCH) at 29,027-28. This test for jurisdiction over unfair-labor-practices charges derives from *Res-Care, Inc.*, 280 N.L.R.B. 670 (1986). The NLRB applies the

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[7]The issue that we face here is what preclusive effect we should give an agency's decision in a case separate from the case before this court. This issue differs from the issue of what deference we should give an agency's findings of fact or determinations of law when we review that agency's decision. *Cf. Construction Employees Union, Local No. 221 v. NLRB*, No. 88-1629, slip op. at 6-7 (D.C. Cir. Mar. 30, 1990) (according "tempered" deference on review of NLRB decision); *Local 777, Democratic Union Org. Comm., Seafarers Int'l Union v. NLRB*, 603 F.2d 862, 872 (D.C. Cir. 1978) (refusing to extend "any great amount of deference" on review of NLRB decision).

Res-Care test in cases involving "employer[s] with close ties to an exempt government entity," *id.* at 672, to determine whether such employers can meaningfully bargain with labor organizations. *See id.* In the case before us, however, deciding whether Mayeske was an "individual employed by an employer" under ERISA, 29 U.S.C. § 1002(6), involves a broader test derived from the common law of agency. *See infra* pp. 10-12. Although no single factor controls the outcome under the common-law test, the question of control over Mayeske's day-today activities plays a central role. Since the NLRB, in applying the National Labor Relations Act, made an inquiry different from the one that the ERISA case law requires us to make, we see no basis for giving the NLRB's decision issue-preclusive effect. We must judge on the merits whether Mayeske was an IAFF employee or an independent contractor.

B. Mayeske's Employment Status

The district court held, and the parties do not dispute, that *Holt* states this Circuit's standard for distinguishing between employees and independent contractors in ERISA cases. We agree that *Holt* controls, although the Supreme Court's recent decision in *Community for Creative Non-Violence v. Reid*, 109 S.Ct. 2166 (1989), influences our approach to the *Holt* common-law test.

The central issue in *Holt* was when the plaintiff's employee status had commenced for purposes of deciding whether her pension rights had vested. The employer in that case claimed that because it intended that the plaintiff have nonemployee status during her first year of work, the

plaintiff was not an employee during that year and did not make progress toward the vesting of her pension rights. This court rejected that claim:

> The simple fact that [the employer] characterized appellant as a contractor did not make her one in the eyes of the law. Rather, the right of one party to control not only the result to be achieved by the other, but also the means and manner of performing the task assigned, is the most critical factor in ascertaining whether an employment relationship exists. Consequently, while all relevant circumstances are to be examined and evaluated, the degree to which English, appellant's supervisor, controlled her daily work activities is the primary consideration in determining her employment status.

Holt, 811 F.2d at 1539 (footnotes omitted). In its analysis of "all relevant circumstances," the court drew on the Restatement (Second) of Agency for "other common-law factors," *id.* at 1540, that differentiate between employees and contractors:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Id. at 1540 n.54 (quoting Restatement (Second) of Agency § 220(2) (1958)). In applying this test, the court stressed the "control over details" factor. *See id.* at 1539 ("[T]he right of one party to control not only the result .... but also the means and manner of performing the task assigned, is the most critical factor....). The court went on to decide that the plaintiff was an employee even in her first year of work and that the period to be used in determining whether her pension rights had vested should include her first year of employment. *See id.* at 1540-41.

The Supreme Court has also recently applied the standards distinguishing employees from independent contractors. *Reid*, 109 S.Ct. at 2166. *Reid* involved a copyright dispute between a sculptor who had prepared a commissioned work and the commissioning organization. The sculptor's claim to copyright ownership depended on whether he was the commissioning organization's employee. *See id.* at 2171-72 (citing 17 U.S.C. § 101(1)). Applying the same common-law test outlined in *Holt*, the Court held that the sculptor was not an employee, but an independent contractor. *Id.* at 2178-79. As the *Reid* Court's analysis makes clear, "the hiring party's right to control the manner and means by which the product is accomplished' deserves separate analysis, *id.* at 2178, but "is not dispositive," *id.* at 2179. The Court found that the sculptor did not control the details of his work, but decided that other facts outweighed this finding. *See id.*[8]

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[8]The Court's findings mirrored the Restatement (Second) test:

> Reid is a sculptor, a skilled occupation. Reid supplied his own tools. He worked in his own studio in Baltimore, making daily supervision of his activities from Washington practicably impossible. Reid was retained for two months, a relatively short period of time. During and after this time, CCNV had no right to assign additional projects to Reid. Apart from the deadline for completing the structure, Reid had absolute freedom to decide when and how long to work. CCNV paid Reid $15,000, a sum dependent on "completion of a specific job, a method by which independent contractors are often compensated." *Holt v. Winpisinger*, 258 U.S.App.D.C. 343, 351, 811 F.2d 1532, 1540 (1987). Reid had total discretion in hiring and paying assistants. "Creating sculptures was hardly 'regular business' for CCNV." 270 U.S.App.D.C., at 35, n. 11, 846 F.2d, at 1494, n. ii. Indeed, CCNV is not a business at all. Finally, CCNV did

In the present case, the district court applied the *Holt* test and found that the IAFF "had limited, if any, control over the details, or day to day operations. of plaintiffs' work." *Mayeske*, No. 86-3283, slip op. at 22. After reaching this conclusion, it took up the remaining Restatement (Second) factors, holding that only one of them, the structure of Mayeske's and her staff's compensation, supported the conclusion that Mayeske and her staff were IAFF employees. *Id.* at 22-23. Our review of the record suggests that the court overlooked critical facts when it applied the (control over details' test, and that it erred in its application of the other Restatement factors as well. Thus, we conclude that in this case, in contrast to Reid, both the 'control over details' test and the other circumstances of Mayeske's work indicate that she was an IAFF employee.

In deciding whether the IAFF controlled the details of Mayeske's work, the district court noted that FEMA's Cooperative Agreements with the IAFF imposed extensive requirements on the Open Learning Program. *See, e.g.*, Federal Emergency Management Agency/National Emergency Training Center Assistance Award (Dec. 3, 1985), J.A. at A680. This fact led the district court to accept the IAFF's portrayal of the Open Learning Program staff as a FEMA contractor occupying space in the IAFF building. *See Mayeske*, No. 86-3283, slip op. at 22. By drawing

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not pay payroll or social security taxes, provide any employee benefits, or contribute to unemployment insurance or workers' compensation funds.

Reid, 109 S.Ct. at 2179.

this conclusion, the court overlooked the point that FEMA contracted with *the IAFF,* not Mayeske and/or her staff. The Cooperative Agreements listed the IAFF as the grant recipient and bore President Gannon's signature. E.g., Assistance Award at 1, J.A. at A680. The IAFF understood the implications of this signature. *See, e.g.,* IAFF Brief at 30 (IAFF paid Mayeske with IAFF checks "because IAFF, as the recipient of the federal funds, was liable for ensuring that those funds were properly .administered"). Events have shown that the IAFF bore responsibility for managing FEMA money: when a 1986 audit of the Open Learning Program led FEMA to question $173,678 in expenditures under the Cooperative Agreements, FEMA held the IAFF, not Mayeske, accountable. See Letter from Estelle Marr to John Gannon (Jan. 12, 1987), J.A. at A739.

As the 1986 audit illustrates, the Cooperative Agreements' most detailed demands pertained to cost accounting and financial management. *See, e.g.,* FEMA, General Provisions for Grants and Cooperative Agreements § 78, 10, J.A. at A697-99, A700-02. When it came to specifying the actual work to be done, however, FEMA had no such penchant for detail. *See, e.g.,* Assistance Award ex. A, at 3, J.A. at A689 (outlining such tasks as "[p]rovid[ing] academic and logistical counseling to students throughout the country" and "[provid[ing] support to program liaisons to maintain the OLFSP goals at each network institution"). Thus, we are not persuaded that FEMA exercised day-today control over the Program staff or that FEMA's supervision of the IAFF's performance made it impossible for the IAFF to have exercised such control. Detailed guidance from FEMA to the contractor, the IAFF, did not supplant the IAFF's control over a staff

that performed the day-today task of complying with the Cooperative Agreements.

Although the record does not show how closely the IAFF officers supervised Mayeske's work, we at least know that President Gannon could control Mayeske's attendance at IAFF functions, such as the 1986 convention, and that he reviewed the annual proposals that Mayeske and her staff prepared. *See, eg.*, Memorandum from B.J. Mayeske to President Gannon (Sept. 22, 1986) (acknowledging Gannon's approval of proposal and asking whether IAFF would continue to sponsor Open Learning Program), J.A. at A793; Memorandum from John A. Gannon to Betty Jo Mayeske (July 2, 1986) ("Cancel all [convention] attendance plans."), J.A. at A754. Gannon's supervision over the proposals suggests considerable practical control over Mayeske. Writing these proposals was one of the most important tasks that Mayeske and her staff performed. Since the proposals formed the basis for each year's Cooperative Agreement, moreover, control over the proposals meant some control over the detailed demands that FEMA made. The district court held that these facts did not show detailed control over Mayeske, and, indeed, that the question of day-today control presented no triable issue. We find this holding erroneous.

In light of the facts recounted in this opinion, we also take issue with the district court's conclusion that "of the factors set forth in the Restatement (Second) of Agency, [quoted supra p. 11,] only one, the fact that plaintiffs were paid a salary, weighs in favor of finding an employment relationship." Mayeske, No. 86-3283, slip op. at 23. On the contrary, many, perhaps most, of the Restatement (Second) standards indicate that Mayeske and

her staff were IAFF employees. The Open Learning Program staff, for example, worked at the IAFF's offices. *See id.* at 6; *see also id.* (IAFF also contributed "nominal amount for supplies and other non-personnel related costs"); cf. Restatement (Second) of Agency § 220(2)(e) (1958) ("whether the employer or the workman supplies the instrumentalities, tools, and the place of work"). When Mayeske became the Open Learning Program's director, she and the IAFF expected the Program to continue for at least five years, subject only to the usual vicissitudes of year-to-year funding. *See* J.A. at 1113 (Mayeske's testimony in NLRB proceeding); cf. Restatement § 220(2)(f) ("the length of time for which the person is employed"). Although the IAFF now asserts that Mayeske performed a specialized job that had no strong link to the IAFF's main mission, the IAFF officers said just the opposite to the membership. *See* International Ass'n of Fire Fighters, Officers' Report at 20 ("The Open Learning program is relevant to our purpose of increasing benefits for our members.... We plan to insure that the OLFSP thrives because this project is important to our members and the future of our profession.'), J.A. at A406; cf. Restatement § 220(2)(h) ('whether or not the work is a part of the regular business of the employer'). Finally, the IAFF hired Mayeske *before* it had any contracts from FEMA or predecessor agencies. It listed itself as Mayeske's employer, and treated her in the same way that it treated other IAFF department heads. These facts suggest that when the IAFF hired Mayeske, both parties believed that Mayeske would be an IAFF employee. *Cf. id.* § 220(2)(i) ("whether or not the parties believe they are creating the relation of master and servant"). In sum, analysis under the Restatement (Second) confirms the result that the "control over details" test suggests: Mayeske and

her staff were IAFF employees, working on a long-term IAFF project.[9]

C. *Effect of the District Court's Employment Status Holding on Other Issues*

The district court has stated alternative grounds for the summary judgment against Mayeske. We decline to review these alternative holdings, since they all rest on the court's conclusion that Mayeske was not an IAFF employee.

As its most important alternative reason for rejecting Mayeske's claims, the district court concluded that "even if plaintiffs were considered 'employees' of the IAFF within the meaning of ERISA, they would still not qualify as 'participants.'" *Mayeske,* No. 86-3283, slip op. at 24. In its analysis of the participation issue, however, the court explicitly relied on its determination that Mayeske was not an IAFF employee. *See id.* at 23 ("Because plaintiffs were not IAFF 'employees' within the meaning of ERISA, it follows that they were not 'participants' either."); *see also id.* at 19 (noting that under ERISA's

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[9]Indeed, given the structure of the Open Learning Program, Mayeske and her staff could not have been anything but IAFF employees. As the above analysis demonstrates, they did not act as four FEMA contractors, or as one collective FEMA contractor under Mayeske's direction, because they held no FEMA contracts. *See supra* pp. 13-14 (IAFF President, not Mayeske, signed Cooperative Agreements). Nor did the staff act as four independent subcontractors, or one collective subcontractor, under the Cooperative Agreements. The Agreements barred the IAFF from subcontracting 'substantive programmatic work' without FEMA's prior approval. General Provisions § 10(d)(2), J.A. at A701.

definition of "participant," 29 U.S.C. § 1002(7), participants must be employees). In deciding whether Mayeske enjoyed participant status under the terms of the IAFF Staff Representatives' Pension Plan, moreover, the court asked whether the IAFF "employed" Mayeske[10] -- an inquiry that involved "many of the same factors" as the court's analysis under *Holt*. *Id.* at 26; *see id.* at 26-27.[11] Given this connection between the court's employment status analysis and its participation analysis, separate review of the holding that Mayeske lacked participant status seems to us imprudent, if not impossible.

For similar reasons, we decline to review the district court's summary judgment against Mayeske on her claims of retaliation, wrongful denial of pension plan documents, and breach of a duty owed to a third-party beneficiary under the Cooperative Agreements. The district court rejected the first two of these claims because of its conclusion that Mayeske was not an IAFF employee or a pension plan participant. *See id.* at 29 ("[B]ecause plaintiffs were neither employees nor participants within

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[10]The IAFF Staff Representatives' Pension Plan (Dec. 21, 1976), J.A. at A132, extends participant status to 'any Employee in the employ of the Employer who is eligible to participate in the Plan,' *id.* § 1.15, J.A. at A139, and defines 'Employee' as 'any person ... employed by the Employer as either a staff representative or a supervisory employee not covered by a collective bargaining agreement,' id. § 1.11, J.A. at A138.

[11]Since the plan does not define "employed by," we see no reason why the common-law definition of 'employee,' *see Holt*, 811 F.2d at 1538-40, should not control the question whether Mayeske was an "Employee' under the Staff Representatives' pension plan. This conclusion creates a significant overlap between the employment status inquiry and the participation inquiry.

the context of ERISA, they had no 'ERISA rights' to exercise. Hence, the defendant IAFF officers can hardly be said to have violated ERISA section 510, by retaliating against plaintiffs....") (footnote omitted); *id.* at 30. ("[D]efendants had no legal obligation to provide plaintiffs with copies of the IAFF pension plan documents, because plaintiffs were neither participants nor beneficiaries of any of the plans."); *see also id.* at 18-19 (calling participant status a standing requirement under ERISA). The court's holding that Mayeske was not an IAFF employee also accounts for its dismissal of the pendent local-law claims: the court refused to exercise jurisdiction over Mayeske's third-party-beneficiary claims largely because it had rejected Mayeske's ERISA claims. *See id.* at 35.

On remand, the district court should redetermine all of the above issues in light of our reasoning.

III. CONCLUSION

For the reasons stated above, we hold that Mayeske was an IAFF employee. Since the district court's contrary holding affected all parts of its decision, particularly its conclusion that Mayeske was not a participant in any IAFF pension plan, we vacate the judgment and remand the case to the district court.

It is so ordered

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-7233

Betty Jo Mayeske, *et al.*,

Appellants

v.

The International Association of Fire Fighters, *et al.*,

Appellees.

No. 89-7104

Betty Jo Mayeske, *et al.*,

Appellants

v.

The International Association of Fire Fighters, *et al.*,

Appellees.

Filed December 5, 1989

ORDER

Upon consideration of appellant's unopposed motion to consolidate, it is

ORDERED that the motion be dismissed as moot. By separate order of this same date the court has dismissed Case No. 89-7233.

The Clerk is directed to file a copy of this order in each of the above captioned cases.

FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

By: */s/ Teresa Johnson*
TERESA JOHNSON
DEPUTY CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-7233

Betty Jo Mayeske, *et al.*,

Appellants

v.

The International Association of Fire Fighters, *et al.*,

Appellees.

BEFORE: Ruth B. Ginsburg, Williams and Sentelle, Circuit Judges

Filed December 5, 1989

ORDER

Upon consideration of appellees' motion to dismiss and the opposition thereto, it is

ORDERED that the motion be granted. Construing the motion as one for summary affirmance, this court grants the motion for the reasons well-stated by the district

court in its Memorandum Opinion and Order filed September 8, 1989.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 86-3283-RCL

BETTY JO MAYESKE, *et al.*,

Plaintiffs,

v.

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, *et al.*,

Defendants.

[Filed March 30, 1989]

JUDGMENT

It is the JUDGMENT of the Court that plaintiffs take nothing, and that judgment is hereby entered on behalf of defendants, for the reasons set forth in the Court's Memorandum Opinion and Order entered this date.

SO ORDERED.

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

Date: March 30, 1989

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 86-3283-RCL

BETTY JO MAYESKE, *et al.*,

Plaintiffs,

v.

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, *et al.*,

Defendants.

[Filed March 30, 1989]

MEMORANDUM OPINION

Plaintiffs, former staff members of the federally funded Open Learning Fire Service Program ("OLFSP"), brought this action under section 502(a) of the Employee Retirement Income Security Act ("ERISA") of 1974, *as amended*, 29 U.S.C. § 1132(a) (1982),[1] under section

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[1]Section 502 (a) of ERISA provides a civil cause of action as follows:

> A civil action may be brought –
>
> (1) by a participant or beneficiary –
>
> (A) for the relief provided in subsection (c) of this section, or

410(b) of the Internal Revenue Code, as third party beneficiaries under a contract between defendant International Association of Fire Fighters ("IAFF"), and for accumulated vacation pay, leave time, and severance pay. The action is brought against three employee pension plans, the organizational sponsor of those plans -- the International Association of Fire Fighters, trustees of the plans, and various officers of the IAFF, alleging that plaintiffs were improperly excluded from participation in the pension plans, and that defendants retaliated against plaintiffs for attempting to exercise their ERISA rights under the plans. Plaintiffs seek injunctive relief, compensatory and punitive damages, and fines imposable under ERISA[2] for failure to provide copies of the pension

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> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]

29 U.S.C. § 1132(a).

[2]Section 104 of ERISA, 29 U.S.C. § 1024 grants participants and beneficiaries the right to review and receive copies of pension plan documents. ERISA section 502(c), 29 U.S.C. § 1132(c) then allows

plan documents to plaintiffs upon request. Finally, plaintiffs allege that defendants improperly charged the federal government, in funding proposals for OLFSP, for pension plan contributions that were never made on behalf of the OLFSP employees, and that as putative third party beneficiaries of the contract between the government and defendants, plaintiffs are entitled to those improperly charged amounts. The matter is currently before this Court on several motions and cross-motions, including defendants' joint motion for summary judgment and in the alternative to strike plaintiffs' demand for punitive damages and a jury trial, plaintiffs' cross-motion for partial summary judgment on their complaint, plaintiffs' unopposed motion for leave to amend the complaint, plaintiffs' motion for substitution of a deceased party plaintiff, and defendants' motion for leave to file an amended answer.

I. FACTS

The essential facts in this case are straightforward and largely undisputed. Defendant International Association of Fire Fighters is a Washington, D.C. based labor organization, representing some 170,000 paid fire fighters throughout the United States and in Canada. As a condition of membership, all members pay monthly dues, which are used in part to fund the salaries of the union president and secretary-treasurer as well as the expenses of the sixteen IAFF vice presidents, who receive, in lieu of salary, per them and expenses while on assignment for the

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the court to impose a fine of up to $100 per day for each day beyond thirty days that a pension plan administrator fails to provide documents requested by a participant or beneficiary.

IAFF. The two IAFF principal officers and sixteen vice presidents make up the IAFF Executive Board. In addition to this executive board, the IAFF employs support staff for its headquarters office and staff representatives, who work in the field assisting IAFF local union affiliates. The salaries for both the support staff and staff representatives are financed through member dues.

Defendant John A. Gannon is currently as he has been since 1980, the president and highest elected officer of the IAFF. Defendant Alfred K. Whitehead is currently, and has been since 1982, the secretary-treasurer of the IAFF. The other named defendants, Elliott Hastings, James McGowan, and Daniel Eberhart, are trustees and fiduciaries of the various IAFF pension plans, and Hastings and McGowan serve as IAFF vice presidents as well.

The IAFF maintains[3] three pension plans -- covering separate groups of officers and employees -- each of which is named a defendant in this action: the IAFF Officers Retirement Plan (covering the president and secretary-treasurer), the IAFF Staff Representatives (covering staff representatives who are members of the IAFF Staff Union and certain IAFF department heads and managerial employees for whom the Staff Union negotiates pension benefits), and the IAFF Employees Plan (covering, primarily, dues paying members of the Office and Professional Employees International Union, Local 2, the exclusive bargaining agent for IAFF non-supervisory office employees; managerial employees; and the secretaries to

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[3]The IAFF is the "administrator" and "plan sponsor" of all three plans as defined in ERISA sections 3(16)(A), (B), 29 U.S.C. §§ 1002(16)(A), (B).

the two principal IAFF officers). With the exception of the IAFF Officers Plan, each of the plans is noncontributory -- the participants make no contributions, rather, contributions are made on their behalf by the IAFF. Moreover, each of the plans has been in existence for many years, the oldest plan being the Employees plan, which was initially effective on August 1, 1957, with subsequent revisions effective on July 1, 1976 and July 1, 1985.

In 1977, defendant IAFF was awarded a federal grant for a one year study to develop higher education opportunities for fire fighters. Plaintiff Betty Jo Mayeske was retained to conduct the study. Following the study, in 1978, IAFF was awarded a follow-on federal grant to develop the Open Learning Fire Service Program, designed to enable fire fighters to earn college credits and baccalaureate degrees through correspondence and independent study courses. The project grant which, required annual approval and funding from the Federal Emergency Management Agency's ("FEMA") National Fire Academy and its predecessor agencies, was initially planned to last only through a five-year developmental stage. Plaintiff Mayeske was continued by the IAFF as the Project Director for the OLFSP.

As the project director, Mayeske interviewed and hired the other plaintiff staff members for clerical and administrative positions within the OLFSP core staff. Plaintiff Betty Morrison was hired in December 1980 as a secretary-bookkeeper, and was subsequently promoted by Mayeske to the position of production coordinator. Plaintiff Shavana King was hired by Mayeske in August 1981 as a clerk-typist, and was later promoted to secretary.

Plaintiff Charles David Martin[4] was hired in September 1985 as an administrative assistant. Both Mayeske and the other plaintiffs concede that they were specifically informed and understood that their employment was subject to the annual availability of federal funds. More significantly, each was specifically informed at the start of his or her employment that as "federal grant employees," members of the project staff were not covered by any pension plan. (Mayeske Deposition, pp. 59-60; Morrison Deposition, p.19; King Deposition, p.16; Martin Deposition pp. 37-38).

While the OLFSP was sponsored by defendant IAFF from 1977 through November 1986, it remained largely autonomous. To begin with the OLFSP was funded almost exclusively by FEMA and its predecessor agencies, with IAFF contributing only a nominal amount for supplies and other non-personnel related costs. Additionally, the OLFSP staff maintained offices separate from, though physically collocated with, the IAFF offices. Third, as discussed above, plaintiff Mayeske interviewed and hired the other plaintiff OLFSP staff members. Lastly, the OLFSP program objectives and requirements required government approval and were set forth in a detailed, annual request for federal assistance-funding proposal -- which Mayeske and her staff prepared. Although the IAFF president signed the proposal and resulting agreement as "grantee/contractor" and had general oversight responsibility for the OLFSP, he did not exercise

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[4]Mr. Martin died testate on January 3, 1988, after this action was filed. Plaintiffs have moved to substitute Charles Liner, the appointed personal representative of Martin's estate, as a party plaintiff. See discussion *infra* at 38-39.

day to day control over the project staff. Rather, Mayeske, as the Project Director and "Recipient Program Manager," acted as the "principal official of the Recipient involved in the project ....[,] responsible for assuring performance of tasks outlined in [the] Cooperative Agreement [with FEMA] and compliance with all of its provisions." Fiscal Year 1986 Application for Federal Assistance and Cooperative Agreement, Plaintiffs' Exhibit 170 at 70. The remaining plaintiffs occupied various core staff and administrative positions within the OLFSP, and under plaintiff Mayeske's direction, administered the program according to the federally approved operational parameters.

Each Spring between 1978 and 1986, plaintiff Mayeske and her staff would prepare draft program objectives and a proposed program budget, for submission, under the signature of the president of the IAFF, to the federal funding agency. The draft budgets included, among other things, the salaries and fringe benefits for OLFSP core staff positions held by plaintiffs. In preparing these annual funding proposals, plaintiffs were instructed by the IAFF to use specified overhead and fringe benefit rates prepared by the IAFF accounting department and which had previously been negotiated between the IAFF and the federal funding agency. The parties agree that while the overhead and fringe benefit rates may have varied somewhat from year to year, the accounting methodology and proposed budget format remained unchanged, and from 1982 until 1986 took the form of a cooperative agreement. In June 1983, IAFF's then president Gannon sent each of the IAFF grant program

directors[5] written instructions for determining the overhead and fringe benefit rates to be included in funding proposals to the federal government. Plaintiffs' Exhibit 156. Notably, an attachment to that memorandum expressly defined fringe benefits as "annual leave earned, -sick-leave *used*, holidays, F.I.C.A., unemployment compensation, workmen's compensation, health insurance, and life insurance," *id.* (emphasis in original), but did not include in the definition pension costs. Neither the funding proposals nor resulting cooperative agreements themselves defined fringe benefits, but merely included the pre-negotiated percentage rates. The parties disagree as to whether those rates used in the annual funding proposals in fact included pension costs within the term "fringe benefits."

Plaintiffs' first indication that they may have been included in, or eligible to participate in, one of the IAFF pension plans came in June 1986 when three of the plaintiffs were solicited by the IAFF to form a union of grant employees for the purpose of bargaining with the IAFF about fringe benefits. Unbeknownst to plaintiffs at the time, the IAFF officers had previously been advised in early 1985, by their pension plan actuary and advisor, Elizabeth Poston, that should the Internal Revenue Service ("IRS") conclude that the grant employees were IAFF "employees" within the meaning of the Internal Revenue

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[5]In addition to the OLFSP, the IAFF has operated a number of other federally funded programs, including the Minority Recruitment, New Directions, Women in Fire Service, and National Apprenticeship programs. The only IAFF grant programs in existence at the time this action arose were the OLFSP and National Apprenticeship program.

Code ("IRC") section 410(b)(1),[6] the plans would not meet the nondiscriminatory coverage requirements of the Code and would therefore lose their tax exempt status. Defendants were thus faced with a number of options, both direct and indirect, for dealing with the potential tax problem. To begin with, defendants could have confronted the employee characterization issue directly by requesting an IRS determination that the plans, excluding grant employees, were not discriminatory (presumably because the grant employees were not IAFF employees within meaning of the IRC).[7] However, defendants considered, and initially attempted, the more indirect solution of assuming the grant employees would be considered IAFF employees, but making pension plans be a subject of negotiation with the grant employees so that those employees could continue to be excluded from the plans without running afoul of the IRC nondiscriminatory requirements. With that admitted ulterior purpose in mind, defendants approached plaintiffs with a document creating a grant employee bargaining unit to negotiate "additional

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[6]IRC § 410(b)(1) provides that for a pension plan to be "qualified" it must not discriminate in favor of officers, shareholders, or highly compensated employees and must benefit a specified percentage of employees. However, § 410(b)(3) excludes from the count of employees those included in an employee bargaining unit which is covered by a collective bargaining agreement negotiated in good faith between such unit and the employer. I.R.C. §§ 410(b)(1), (6), 26 U.S.C. §§ 410(b)(1), (6).

[7]Defendants were required in any event, under recently amended provisions of the Internal Revenue Code, to file a request for determination of tax qualification of their pension plans with the Internal Revenue Service by June 30, 1986. I.R.S. Notice 86-3, I.R.B. 1986-9, 21 *as amended by* Announcement 86-60, I.R.B. 1986-1917.

fringe benefits.[8] Plaintiffs' Exhibit 103, "Agreement Establishing the Association of IAFF Grant Employees. While not knowing the background details or specifics of the ulterior motive, plaintiffs were nonetheless suspicious enough of defendants' offer to refuse to sign the document and collectively seek legal advice. Shortly thereafter, on June 27, 1986, plaintiffs' newly retained attorneys hand-delivered a letter to IAFF President Gannon, which explained that they had been retained "to represent your employees in the Open Learning Fire Service Center" regarding their participation rights in the [unspecified IAFF] pension plan, and a proposal currently being circulated to form an association of grant employees." In addition, the letter requested a copy of the IAFF Officers Retirement Plan and related documents. Rather than responding to the letter, Gannon confronted Mayeske, and reiterated the IAFF position that she had no pension rights. Thereafter, plaintiffs' attorneys made another written request, this time to the IAFF General Counsel, Thomas Woodley, for copies of plan documents for all three IAFF pension plans and the latest annual reports for each plan. Woodley responded in writing the following day, refusing the request and explaining that because the OLFSP staff members were neither participants nor beneficiaries of any of the pension plans they were not legally entitled to obtain

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[8]Interestingly, defendants first asked Local 2 of the Office and Professional Employees International Union to represent plaintiffs solely for the purpose of negotiating fringe benefits such as pensions. In a parallel proceeding before the National Labor Relations Board, *infra* n.9, the shop steward of Local 2, Cheryl Gannon, testified that she refused defendants' sudden overtures, and found them suspicious because defendants had consistently resisted efforts to organize the grant employees in the past. National Labor Relations Board Testimony of Cheryl Gannon at 62-65.

plan documents. The same day, unbeknownst to defendants, plaintiffs' attorneys sent letters to both the IRS and Department of Labor, complaining that one or more of the IAFF pension plans were discriminatory, and requesting Labor to conduct an investigation of allegedly retaliatory actions being taken by the IAFF against their clients.

Relations between the IAFF and OLFSP were, perhaps not surprisingly, less than, cordial throughout the summer months of 1986. Plaintiffs characterize the sequence of events that summer as a "program of retaliation," Plaintiffs' Statement of Material Facts as to Which There is No Genuine Dispute at 20, while defendants insist that "a number of issues and concerns arose regarding OLFSP," Defendants' Statement of Facts as to Which There is No Genuine Dispute at 12. First, defendants decided not to allow plaintiffs Mayeske and Morrison to represent the OLFSP at the IAFF's annual convention, despite the fact that the OLFSP had been represented in previous years, and despite the fact that it had been scheduled to appear that year. N.L.R.B. Testimony of Betty Jo Mayeske at 278-80. While defendants explain that their decision was based on the fact that FEMA funding for the following year was unlikely, and representation at the convention would therefore be somewhat futile, they nonetheless ultimately compromised, allowing reduced representation. Plaintiffs' Exhibit 96, July 17, 1986 Memorandum from Gannon to Mayeske. Later, defendants decided to step up the enforcement of parking rules, limiting the underground, most convenient, spaces to IAFF directors, thereby allegedly "revoking" plaintiff Mayeske's parking privileges. Defendants, on the other hand, insist that they simply insisted that the OLFSP,

staff not use more than the one space to which they were entitled and, that Mayeske never had to pay for parking in any event. Defendants' Opposition to Plaintiffs' Summary Judgment at 20. Finally, during its September 1986 meeting, the IAFF Executive Board voted to discontinue IAFF sponsorship of the OLFSP. In a letter of notification to the Director of FEMA on September 30, 1986, defendant Gannon, on behalf of the IAFF Executive Board, suggested "that the National Fire Academy would probably be the best educational arm of the fire service to handle this project and we are highly recommending that the program be moved to Emmitsburg, MD." Defendants' Statement of Facts as to Which There is no Genuine Dispute at Tab 23. The IAFF affiliation with the OLFSP thus ended in November 1986 at the conclusion of the existing cooperative agreement. Contemporaneously, because FEMA was unprepared to assume direct control and administration of the OLFSP, the employment of the OLFSP staff was terminated. Plaintiffs brought this action on November 28, 1986.[9]

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[9]One month later, plaintiff Betty Ann Morrison lodged an unfair labor practice complaint against defendant IAFF with the National Labor Relations Board, alleging that the IAFF violated several provisions of the National Labor Relations Act by "having unlawfully assisted in the formation of a labor organization to represent certain of its employees and soliciting those employees to join that organization; by discriminatorily terminating the employment of Charging Party Morrison, David Martin and Shavana King because they did not join and because they concertedly sought legal counseling regarding their rights; and by discriminatorily terminating the employment of supervisor Betty Jo Mayeske." N.L.R.B. Division of Judges, Case No. 5-CA-18553 (January 29, 1988). The case, including extensive testimony by all of the parties herein, was heard before an administrative law judge during September and October 1987. The administrative law judge, in his written

II. DISCUSSION

A. Plaintiffs' ERISA Claims

1. Statute of Limitations

In their amended answer, for which leave to file was sought after cross motions for summary judgment, and on the eve of the dispositive motions hearing before this Court, defendants raised the affirmative defense of a limitations period having run on plaintiffs' ERISA claims. While defendants first raised the limitations defense in their motion for summary judgment, it was not until plaintiffs' memorandum in opposition -- pointing out that under Rule 8 (c) of the Federal Rules of Civil Procedure, defendants

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recommendation to the NLRB, concluded that the NLRB should not assert its statutory jurisdiction over the IAFF as employer of the plaintiffs, because FEMA rather than the IAFF "had final say over the OLFSP compensation levels." N.L.R.B. Division of Judges, Case No. 5-CA-18553 at 14. On February 10, 1989 a three member panel of the NLRB remanded the case to the administrative law judge for a full determination on the merits, concluding, contrary to the judge's findings, that the IAFF "had sufficient authority over the compensation and conditions of employment of the OLFSP employees to engage in meaningful bargaining with them . . . . 292 NLRB No. 114 at 7 (February 10, 1989).

Two points are worth noting about the decision of the NLRB panel. First, the decision has no precedential value in this Court. Second, the decision is inapposite in any event. Although the NLRB found that the OLFSP employees were "employed" by the IAFF, seemingly contrary to what this Court finds, *infra* at 21-23, the NLRB focused on one aspect of the common law definition of agency -- that of control over compensation and salary -- and based its decision on that factor. In other words, the NLRB panel applied a different definition of "employed" for purposes of NLRB jurisdiction than this Court must apply for purposes of standing under ERISA.

had waived any affirmative defenses not raised in their answer -- that defendants attempted to correct the procedural defect in their pleadings. Rule 15(a) allows amendment of a party's pleadings, by leave of the court, and provides that "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Moreover, the Federal Rules are not intended to be a procedural trap for the unwary. *Cf., SEC v. National Student Marketing Corp.*, 73 F.R.D. 444, 447 (D.D.C. 1977) (allowing SEC to conform pleadings to evidence five years after complaint filed, where opposing party was not taken by surprise and was fully prepared to litigate). Although plaintiffs assert that "permitting amendment here would undermine rather than serve the ends of justice," because plaintiffs were not apprised of the defense in time to "prepare to defend against it," Plaintiffs' Opposition to Defendants' Motion for Leave to File an Amended Answer at 5-6, plaintiffs have not shown that they would, or could, have prepared their case any differently had defendants not been dilatory in correcting their pleadings. Indeed, all of the necessary facts are, and were, already a matter of record. Hence, plaintiffs' reliance on *Anderson v. U.S. Air, Inc.*, 619 F.Supp. 1191, 1198 (D.D.C. 1985), *aff'd.*, 818 F.2d 49, 57 (D.C. Cir. 1987), is misplaced. Here, unlike in *Anderson*, there is no delay necessitated by allowing the amendment. Moreover, as is further discussed below, defendants' limitations defense is unavailing in any event.

Both plaintiffs and defendants agree on the appropriate statute of limitations period applicable to each part of plaintiffs' ERISA claims. First, plaintiffs' claim for pension plan benefits is brought under ERISA section

502(a)(1)(B)[10], which has no express statute of limitations. Because the statute does not provide a specified limitation period, the Court must necessarily turn to the limitation period from the most closely analogous state law cause of action. *Richards v. Mileski*, 662 F.2d 65, 68 (D.C. Cir. 1981) (where Congress has not provided express limitation period, court must use local statutes of limitation). Courts in this circuit have consistently held that the applicable limitation period for a claim for benefits under ERISA section 502(a)(1)(B) is three years, consistent with the District of Columbia limitation period for actions sounding in contract. *Estate of Grant v. U.S. News and World Report, Inc.*, 639 F. Supp. 342, 347-48 (D.D.C. 1986) (reasoning that "[c]ourts have generally likened a claim for benefits due to a suit on a contract," court applied D.C. Code Ann. § 12-301(7)). Second, plaintiffs' claim for breach of fiduciary duty in excluding them from coverage under the pension plans is brought under ERISA section 404, which does have an express limitations period. Specifically, ERISA section 413 provides a six year limitations period from the date of the last act or omission constituting a breach of fiduciary duty, unless the plaintiff knew or should have known of the breach or violation, in which case the limitations period is reduced to three years from the date of that actual or imputed notice.[11]

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[10]*Supra* n.1; 29 U.S.C. § 1132(a)(1)(B).

[11]ERISA section 413 provides as follows:

> (a)* No action may be commenced under this sub-chapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of --

Plaintiffs and defendants disagree, however, on the time at which the two limitation periods began to run. Defendants argue, somewhat disingenuously, that because plaintiffs were expressly told, in their initial employment interviews, that they were not covered by any of the IAFF pension plans, both limitation periods began to run at that point. On the other hand, plaintiffs correctly note that it was not until the summer of 1986 that they had any indication that they may have been covered by, or eligible to participate in, the IAFF plans. In other words, assuming for the moment that plaintiffs are entitled to rights and benefits under one or more of the IAFF plans, then defendants could not trigger the limitation period by lying to the

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> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
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> (2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation, or (B) on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this subchapter;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.
>
> *So in original. No subsec. (b) has been enacted.

29 U.S.C. § 1113.

plaintiffs and then withholding the only information that would give plaintiffs reason to question what defendants had told them. Indeed, ERISA section 413 specifically addresses this very issue, and tolls the limitations period "in the case of fraud or concealment." ERISA § 413(a), 29 U.S.C. § 1113 (a); *supra* n. 11. The same rule obtains in plaintiffs' section 504 claim for benefits. Under federal common law, as applied to ERISA actions,[12] the limitation period does not begin to run until plaintiffs knew or should have known the facts underlying a cause of action. See *Richards v. Mileski*, 662 F.2d at 68-71 (where defendant fraudulently concealed facts giving rise to plaintiff's claim, limitation period is tolled until plaintiff discovers or reasonably could have discovered those concealed facts). As the Supreme Court explained in an analogous case dealing with Social Security claimants who had been denied benefits on the basis of an undisclosed internal policy of the Social Security Administration, while plaintiffs may have known that they had lost or been denied benefits, they had no way of knowing "that those adverse decisions had been made on the basis of a systemic procedural irregularity that rendered them subject to court challenge," and thus it is not until plaintiffs have had a reasonable opportunity to discover that "systemic procedural irregularity" that the statute of limitations begins to run. *Bowen v. City of New York*, 476 U.S. 467, 480-81 (1986) (quoting from the opinion of the Second Circuit Court of Appeals, 742 F.2d 729, 738). Here, as in

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[12]Although the statute of limitations applicable to an ERISA claim for benefits is adopted from local law, the events which trigger or toll the limitations period are found in federal common law. *Richards v. Mileski*, 662 F.2d 65, 68 (D.C. Cir. 1981) (citing *Fitzgerald v. Seamans*, 553 F.2d 220, 228 (D.C. Cir. 1977)).

Bowen, plaintiffs had no way of knowing that they were being denied benefits *improperly*, if in fact the denial was improper, until they had been given the plan documents or otherwise put on notice that they may have been eligible to participate in the plans. It was not until defendants' actions during the summer months of 1986 that plaintiffs had any reason to believe that defendants had misrepresented plaintiffs' status under the IAFF plans. Plaintiffs certainly did not sit on their rights at that point, but rather, filed suit within a matter of months after defendants first approached them with the ill-fated plan to organize the grant employees into a bargaining unit. Hence, even considering defendants' late-filed limitations defense -- by allowing defendants leave to amend their answer -- defendants have not shown that plaintiffs' ERISA claims are time-barred.

2. Plaintiffs' Claim of Entitlement to Coverage Under the IAFF Plans

To maintain a claim under ERISA section 502(a) for benefits due under one of the IAFF pension plans, or to clarify or enforce rights under any of those plans, plaintiffs must first show that they come within one of the classes granted standing under the ERISA remedial scheme. That is, plaintiffs must each qualify as either a participant, beneficiary, or fiduciary of one of the plans. ERISA § 502(a), 29 U.S.C. § 1132(a); *supra* n.1. Plaintiffs do not claim to be beneficiaries[13] or fiduciaries of any of the

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[13]Arguably, the claim of deceased plaintiff Charles David Martin, sought to be made by the personal representative of Martin's estate, is more appropriately characterized as the claim of a "beneficiary" than of a "participant." However, the claim of plaintiff Martin, if it survives

IAFF plans. Rather, plaintiffs, argue that they were employees of the IAFF and therefore eligible to participate, if not actually participants, in at least one of the IAFF pension plans.

"Participant" within the statutory scheme of ERISA is a subset of the term "employee." The Act defines a participant as an "employee or former employee of an employer ... who is or may be eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer ...." 29 U.S.C. § 1002(7). The Act unhelpfully defines "employee" as "any individual employed by an employer." 29 U.S.C. § 1002(6). Because "[t]he statutory definition thus provides little or no guidance," *Holt v. Winpisinger*, 811 F.2d 1532, 1538 (D.C. Cir. 1987), this Circuit has recently explained that to determine employee status "one must look to common-law rules of agency status," *Holt*, 811 F.2d at 1538;[14] *but see Darden v. Nationwide Mutual Insurance Co.*, 796 F.2d 701, 706 (4th Cir. 1986) (concluding that "the common-law test for the relationship of master and

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at all, is necessarily premised on a finding that Martin himself was a participant in one of the IAFF plans.

[14]In *Holt*, the standard for determining employee status -- as opposed to application of that standard -- was not actually an issue on appeal. *Holt*, 811 F.2d at 1538. The district court had held that the appropriate standard was the common-law test of agency and on appeal both parties agreed. *Id.* However, the circuit court noted that "[i]n this approach we fully concur," and considered it "plain[] enough" that in drafting ERISA, "Congress intended the Secretary of Treasury and the Secretary of Labor, who were administrators of various ERISA provisions, to continue their practice of defining 'employee' in terms of common-law agency principles." *Id.* at 1538, n.44. Moreover, the court found that the "cases generally agree." *Id.* at 1535 n.20.

servant is not the appropriate standard for application" in determining employee status under ERISA; rather, the term "employee: must be "considered 'in the light of the mischief to be corrected [by ERISA] and the end to be attained'").[15]

i. Plaintiffs Status as "Employees"

In applying the common-law standard, "the right of one party to control not only the result to be achieved by the other, but also the means and manner of performing the task assigned, is the most critical factor in ascertaining

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[15]Plaintiffs criticize defendants' reliance on *Darden*, arguing that defendants turn the case on its head. While plaintiffs are correct that the court in *Darden*, on the facts of that particular case, found the common-law standard too restrictive -- ultimately concluding that despite the fact that plaintiff was properly characterized under the common-law test as an independent contractor he was nonetheless an employee within the meaning and protection of ERISA -- the court did not reject the common-law standard on that basis. *Darden*, 796 F.2d at 706. Instead, the court rejected the common-law standard as simply being inappropriate, and held that the proper approach was to first ascertain the congressional purpose and then fashion a standard accordingly. The resulting standard defined employees as "persons whose retirement benefits were 'anticipated'" and who had "relied on that expectation by remaining for 'long years,' or a substantial period of time, in the 'employer's' service, and by foregoing other significant means of providing for their retirement." *Id.* It was "that category of persons -- those for whom the forfeiture of accrued employee benefits results in financial hardship during retirement," the court reasoned, "that was the focus of congressional concern." *Id.* This Circuit, in a more recent case than *Darden*, continued to apply the common-law standard of agency, holding that the intent of the parties was but "one of a number of factors[] that the common law weighs in distinguishing an employee from an independent contractor." *Holt*, 811 F.2d at 1538-39; *supra* n.14.

whether an employment relationship exists." *Holt*, 811 F.2d at 1539 (citations omitted). Although in some circumstances the "right-to-control test alone might be dispositive," the common-law also looks to other factors to help "differentiat[e] between an employee and an independent contractor." *Id.* at 1540, n.54. In particular, the Restatement (Second) of Agency § 220(2) (1958), cited with approval in *Holt*, 811 F.2d at 1540 n.54, lists the following factors which indicate the existence of an employment relationship:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time f or which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Restatement (Second) of Agency § 220(2) (1958).

Applying these factors to the facts at hand, the Court finds as a matter of law that plaintiffs were independent contractors and employees of defendant IAFF. First, and of primary significance, defendants had limited, if any, control over the details, or day to day operations, of plaintiffs' work. The details and itemized tasks to be accomplished each year were proposed by plaintiffs, and approved by the federal funding agency. While defendants had general oversight responsibility, it was plaintiff Mayeske, as director of the OLFSP, who had the responsibility for ensuring compliance with the cooperative agreements. Moreover, the other factors set forth in the Restatement (Second) of Agency overwhelmingly indicate that no employment relationship existed. The OLFSP was almost entirely funded through federal funds, and was not integrally related to the primary business of the IAFF, which is to promote and secure improved wages, hours and working conditions of fire fighters through collective bargaining and legislative lobbying. Performance of the OLFSP work called for the sort of specialized skill for

which employers would normally hire independent contractors -- indeed, the OLFSP itself was a direct follow-on to a year-long, independent study conducted by plaintiff Mayeske. The OLFSP offices were functionally, though not physically, separate from those of the IAFF. The plaintiffs were employed for a specific project, operation of the OLFSP, and understood that their employment was on a year to year basis, subject to the continued availability of federal funds. Indeed, of the factors set forth in the Restatement (Second) of Agency, only one, the fact that plaintiffs were paid a salary, weighs in favor of finding an employment relationship. Finally, even if the Court were to conclude that *Darden* broadened the definition of employee, plaintiffs' position is not improved. First, plaintiffs have not shown that defendants did anything to lead them to believe that they were covered by a pension plan. Indeed, just the opposite is true. Defendants told plaintiffs that they were "grant employees," and as such, were not only subject to yearly uncertainty about continued employment, but were not covered by any of the IAFF pension plans. Second, plaintiffs do not meet the second prong of the *Darden* test. Plaintiffs have not shown that they relied on an expectation of pension benefits, or worked "long years" for the IAFF, foregoing other retirement preparations such that they are harmed by the sudden lack of IAFF pension benefits. *Darden*, 796 F.2d at 706. In sum, under either the traditional common-law test, or the test set forth in *Darden*, plaintiffs cannot properly be considered employees of the IAFF within the meaning of ERISA.

ii. Plaintiffs' Status as "Participants"

Because plaintiffs were not IAFF "employees" within the meaning of ERISA, it follows that they were not "participants" either. Hence, plaintiffs have no ERISA-related entitlements or protections with respect to any of the IAFF plans. Indeed, plaintiffs do not even have standing under ERISA to maintain this action, and defendants' motion for summary judgment on plaintiffs' ERISA claims can properly be granted for that reason alone. However, defendants argue, and the Court agrees, that even if plaintiffs were considered "employees" of the IAFF within the meaning of ERISA, they would still not qualify as "participants."

A participant under ERISA is one who, in addition to being an "employee," also "is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer...." 29 U.S.C. § 1002(7); *supra* at 18. The Supreme Court, in *Firestone Tire & Rubber Co. v. Bruch*, No. 87-1054 (U.S. Feb. 21, 1989) (available on 1989 U.S. LEXIS 599), interpreted the ERISA term "participant" to "mean either 'employees in, or reasonably expected to be in, currently covered employment'... or former employees who 'have ... a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to vested benefits...." *Firestone Tire & Rubber*, No. 87-1054, slip op. at 11 (citations omitted). In sum, the Court held that for a claimant "to establish that he 'may become eligible for benefits,' [he] must have a colorable claim that (1) he will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Id.*

Plaintiffs argue that under the "plain and simple language" of the IAFF pension plan documents, all of the OLFSP employees were participants in at least one plan. Specifically, they point to the fact that the Employees Plan, in effect from 1976 until June, 1986, stated that it covered

> any person, excluding officers, excluding staff representatives, and excluding supervisory employees not subject to collective bargaining, who is employed by the Employer.

IAFF Employee Plan (1976).[16] In addition, they argue that while Mayeske and Morrison, who were supervisory employees not subject to collective bargaining, may not have come within the broad language of the Employees Plan, they nonetheless were covered by the equally broad language of the 1975 Staff Representatives Plan, which by its own terms covered

> any person who, on or after the effective date of the Plan, is employed by the Employer as either a staff representative or a supervisory employee not covered by a collective bargaining agreement.

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[16]Interestingly enough, plaintiffs ignore the fact that the IAFF Employee Pension Plan goes on to state that a participant "will not receive any benefit if [he or she] terminate[s] employment before age 62 with less than 10 years of service." IAFF Employee Pension Plan at 7. None of the plaintiffs had the requisite years of service or had reached age 62 at the time their employment was terminated.

IAFF Staff Representative Plan (1975). Read together, plaintiffs argue, the two plans covered all of the OLFSP employees, and the defendant plan trustees therefore breached their fiduciary duty to plaintiffs by refusing to allow plaintiffs to participate in the plans.

In reviewing the trustees' decision to exclude plaintiffs from coverage under the pension plans, the Court applies a *de novo* standard of review. *Firestone Tire & Rubber Co.*, No. 87-1054, slip op. at 10.[17] To find that defendant trustees improperly excluded plaintiffs from coverage, plaintiffs must have had a "colorable claim" that they were eligible to receive benefits or would have fulfilled any eligibility requirements in the future. As is often the case, the validity of plaintiffs claims turns on the interpretation of the terms in the plan themselves. *Firestone Tire & Rubber Co.*, No. 87-1054, slip op. at 10. Here, the key terminology, in both plans at issue, is the phrase, "who is employed by the Employers." Defendant trustees could quite reasonably have determined, and indeed this Court does so determine *de novo*, that the grant employees were not "employed" by the IAFF within the meaning of the IAFF plans.

In fact, many of the same factors which led the Court to conclude that plaintiffs were not "employees" of the IAFF within the meaning and protection of ERISA,

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[17]The *de novo* standard of review applies "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. *Firestone Tire & Rubber Co.*, No. 87-1054, slip op. at 10. Neither the IAFF Employees Plan nor the IAFF Staff Representatives Plan gave the plan administrator such discretionary authority.

supra at 22-23, apply equally as well to the interpretation of "employed by the Employer." Principally, the grant employees were not similarly situated with other IAFF employees; unlike other IAFF employees, the grant employees were not "permanent" --they were hired on a yearly basis for particular projects -- and their salaries were not paid by the IAFF. Moreover, the Court's conclusion is buttressed by the fact that the same interpretation was applied consistently. Plaintiffs do not dispute the fact that none of the various grant employees involved in any of the IAFF- sponsored programs over the years has been covered under any IAFF pension plan during his or her tenure with the program. Nor does the fact that the plans were subsequently changed -- to make more explicit the exclusion of the grant employees -- strengthen plaintiffs' argument. Indeed, those plan amendments, coupled with the undisputed fact that defendant IAFF officers never even considered the option of including the grant employees in any of the pension plans, supports defendant trustees' interpretation that plaintiffs were intended to be excluded by the original plan documents. That is, the plan amendments clarified rather than modified the terms of the original plans.

Finally, plaintiffs' argument that defendants have defeated the intent of ERISA by denying them coverage is simply incorrect. While ERISA protects participants from losing accrued benefits, it does not *require* employers to provide pension plan coverage to its employees in the first place. *Moore v. Reynolds Metals Co. Retirement Program for Salaried Employees*, 740 F.2d 454, 456 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985) ("[A]n employer has no affirmative duty to provide employees with a pension plan. H. Rep. No. 93-807, 93rd Cong., 2d

Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 4670, 4677.); *Phillips v. Amoco Oil Co.*, 614 F. Supp. 694, 709 (S.D. Ala. 1985), *aff'd*, 799 F.2d 1464 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987)("ERISA does not require that employers provide employee benefits at all; does not confer a general right to continued employment in order to earn vested retirement benefits or to become eligible for other benefits; and does not mandate level or amount of such benefits."). Rather, it was designed to ensure that employee pension expectations, *once established*, would not be defeated. *Darden*, 796 F.2d at 706 ("Congress was concerned that 'many employees with long years of employment are losing anticipated retirement benefits'"); *see also, Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981) ("Congress through ERISA wanted to ensure that 'if a worker has been promised a defined pension benefit upon retirement -- and if he has fulfilled whatever conditions are required to obtain a vested benefit -- ... he actually receives it.'")(quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980)). That is, as the United States Court of Appeals for the Fourth Circuit found in *Darden*, the Act was intended to protect employees who had been led to expect pension benefits, and who relied on those expectations to their detriment by continuing to serve the employer for many years, only to have their employment terminated prior to the vesting of pension benefits. *Darden*, 796 F.2d at 706. Plaintiffs, as discussed above, were never led to believe that they would be covered by a pension plan. Nor is there any evidence that they otherwise expected to be covered, much less relied on that expectation.

3. Plaintiffs' Claims of Retaliation and Denial of Access to Plan Documents

Aside from plaintiffs' lack of evidence of a retaliatory motive behind any of defendants' actions during the summer months of 1986, for which defendants have provided adequate non-retaliatory explanations,[18] because plaintiffs were neither employees nor participants within the context of ERISA, they had no "ERISA rights" to exercise. Hence, the defendant IAFF officers can hardly be said to have violated ERISA section 510,[19] by retaliating against plaintiffs "for exercising any right to which [they were] entitled" under the provisions ERISA or an employee benefit plan, 29 U.S.C. § 1140, when plaintiffs had no such rights to exercise. Nor, for that

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[18]See discussion *supra* at 11-12.

[19]ERISA section 510 provides, in pertinent part, that

> [i]t shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a *participant* or *beneficiary* for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such *participant* may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter....

29 U.S.C. § 1140 (emphasis added).

matter, could the defendant trustees have breached their fiduciary duties under section 404 of the Act by engaging in retaliatory acts, or attempting to exclude plaintiffs from participation, 29 U.S.C. § 1104, because they owed no fiduciary duty to plaintiffs in the first place. On the other hand, while plaintiffs' complaint of unfair labor practices, made to the Department of Labor, would be protected conduct under the second part of ERISA section 510,[20] notwithstanding the fact that plaintiffs were neither participants nor beneficiaries of any of the IAFF plans, there is no evidence that defendants took any action against plaintiffs because of plaintiffs' complaint. Indeed, defendants did not even know of plaintiffs' allegations to the Department of Labor until well after all of the allegedly retaliatory acts took place. Finally, defendants had no legal obligation to provide plaintiffs with copies of the IAFF pension plan documents, because plaintiffs were neither participants nor beneficiaries of any of the plans. ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4); *supra* n.2; *see also, Firestone Tire & Rubber Co.*, No. 87-1054, slip op. at 10-12 (rejecting lower court's holding that a "participant" entitled to plan documents "is any person who claims to be" entitled to plan benefits). Thus, defendants are not liable for the fine, imposable under section 502(c) of ERISA, 29 U.S.C. § 1132(c), for failing to furnish plaintiffs copies of the plan documents upon request.

4. Plaintiffs' Claim of Entitlement to IAFF Pension Plan Coverage by Virtue of Internal Revenue Code § 410(b)

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[20]See n.19 *supra*.

Plaintiffs' argument that because defendants may have violated the nondiscrimination provision of Internal Revenue Code section 410(b)(1)(A), 26 U.S.C. § 410(b)(1)(A), which plaintiffs maintain, "prohibits discrimination against employees," plaintiffs are therefore entitled to IAFF pension plan coverage is wrong as a matter of law. The Internal Revenue Code does not "prohibit" discrimination against employees. It merely provides tax incentives for businesses that provide employee benefits on a nondiscriminatory basis; pension plans which meet specified participation standards, and do not discriminate in favor of officers, shareholders, or highly compensated employees, are considered "qualified" plans, and thereby gain a favored tax status. The fact that one or more of the IAFF plans should not be considered "qualified," even if true, does not create any substantive rights, ERISA or otherwise, for plaintiffs. *Reklau v. Merchants Nat'l Corp.*, 808 F.2d 628, 631 (7th Cir. 1986), *cert denied*, ___ U.S. ___, 107 S.Ct. 2180 (1987) ("'There is no basis ... in ERISA, to find that the provisions of IRC § 401 - which relate solely to the criteria for tax qualification under the Internal Revenue Code -- are imposed on pension plans by the substantive terms of ERISA.'" Nor, the court held, does IRC § 401 give an implied cause of action under ERISA.) (quoting from the opinion of the lower court); *Weisner v. Romo Paper Products Corp.*, 514 F. Supp. 289, 291 n.2 (E.D.N.Y. 1981)(IRC nondiscrimination provisions "do not create a substantive right that a beneficiary, participant or fiduciary could enforce.").

5. The Standards Governing Entry of Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that upon a timely made motion for summary judgment, "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56(c). Moreover, Rule 56(e) goes on to state that "[w]hen a motion for summary judgment in made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the party." Fed. R. Civ. P. 56(e). The Advisory Committee notes that the "very mission of the summary judgment procedures is to pierce the pleadings and to assess the proof to see whether there is a genuine need for trial." Fed. R. Civ. P. 56(e), Advisory Committee Note. Three Supreme Court cases decided in 1986 confirm this view, and highlight the usefulness of summary judgment in disposing of cases, such as this, that need not go to a jury. *See generally, Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)("One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose."); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986)(court

should not send case to jury "unless evidence is of such a character that it would warrant a jury in finding a verdict in favor of that party"); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-89 (1986)("Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.")

Here, in order for plaintiffs' ERISA claims to survive defendants' motion for summary judgment, plaintiffs unquestionably bear the jurisdictional burden of showing that they were "participants" of at least one of the IAFF pension plans, within the meaning of ERISA. Plaintiffs have failed to meet that burden. Thus, as the Supreme Court held in *Celotex*, the entry of summary judgment for defendants on plaintiffs' ERISA claims is appropriate, because despite having had "adequate time for discovery," plaintiffs still "fail[] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." 477 U.S. at 322. Moreover, the few *factual* disputes in the case at bar are irrelevant to the outcome -- plaintiffs simply lack standing to bring their ERISA claims -- and thus do not preclude entering summary judgment. As the Supreme Court explained in *Anderson v. Liberty Lobby*,

> the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact .... Only disputes over facts that might affect the outcome of the suit

> under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

477 U.S. at 247-48 (emphasis in original).

B. Plaintiffs' Common Law Claims

Plaintiffs' unopposed motion to amend their complaint was orally granted by this Court on February 23, 1988. In their amended complaint, plaintiffs ventured beyond their original ERISA claims to add the allegation that the IAFF improperly charged FEMA, in funding proposals, for pension plan contributions never made on behalf of plaintiffs, and to include two local, common-law based counts. First, in count X, plaintiffs seek accrued fringe benefits, including severance pay and unused annual leave. Second, in count XI, plaintiffs seek to recover, as putative third party beneficiaries of the cooperative agreements between the IAFF and FEMA, the amounts defendant IAFF purportedly overcharged FEMA. Defendants urge this Court to decline to exercise its pendent jurisdiction over either of plaintiffs' local, common-law claims. In the alternative, defendants argue that plaintiffs local law claims should be dismissed in any event, because they are preempted by ERISA. While not wholly embracing the rationale advanced by defendants, the Court does agree with the net result defendants urge, that is, that both of plaintiffs' local law claims should be dismissed.

Although this Court clearly has the constitutional power to exercise pendent jurisdiction over plaintiffs' local,

common-law claims, because those claims derive from the same nucleus of operative facts as the federal ERISA claims, *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), there are a number of prudential considerations militating against the exercise of that pendent jurisdiction. First and foremost, because of the Court's disposition of plaintiffs' ERISA claims, there no longer remains any viable federal law claim. That factor alone is a sufficient, and appropriate, reason for this Court to decline its pendent jurisdiction. As the Supreme Court explained in *Gibbs*,

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

383 U.S. at 726; *accord, Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 210 (D.C. Cir. 1985)(holding that district court properly dismissed state law claims where federal claims supporting pendent jurisdiction were dismissed).

Second, the local law issues involved in plaintiffs' common law claims are not at all straight forward. Indeed, plaintiffs' claims appear tenuous at best, and are, thus far, largely unsupported by the evidence of record. For example, plaintiffs' third party beneficiary claims obviously hinge on a determination that plaintiffs were indeed third party beneficiaries of the cooperative agreements between FEMA and the IAFF. As defendants

quite accurately point out, the cooperative agreements were for the benefit of the firefighters, and plaintiffs were only incidental beneficiaries.[21] In other words, if defendants did indeed overcharge FEMA, it is not at all clear that plaintiffs, instead of FEMA, are entitled to those overcharges. Moreover, plaintiffs have not shown that defendants improperly charged FEMA for pension contributions on behalf of plaintiffs.[22] Plaintiffs have merely shown (1) that the percentage used for fringe benefit costs in the funding proposals -- for OLFSP salaries -- was *similar* to the fringe benefit percentage used -- for IAFF permanent employees' salaries, which expressly included pension plan contributions -- in the labor union's annual financial disclosure statement, and (2) that applicable Office of Management and Budget regulations

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[21]Notably, in *Honey v. George Hyman Construction Co.*, the District Court for the District of Columbia held that under District of Columbia law

> [i]n order to qualify as a third-party beneficiary, an individual must have been intended by the contracting parties at the time of contracting to be a beneficiary of their contract. An unintended or incidental beneficiary has no right as a stranger to the contract to enforce its provisions or collect damages for its breach.

63 F.R.D. 443, 450 (D.D.C. 1974).

[22]Defendants point out that the IAFF is involved in lengthy, still ongoing negotiations with FEMA over FEMA's attempt to recoup costs from the IAFF as a result of a 1986 audit of the OLFSP, which concluded that a number of the OLFSP's indirect costs, fringe benefit costs, and some direct costs, for years beginning with fiscal year 1982, did not comply with the applicable Office of Management and Budget regulations. Defendants' Supplemental Statement of Facts at 8.

governing cooperative agreements with organizations like defendant IAFF allow, but do not require, pension plan costs. Plaintiffs overlook the fact that the two percentage figures were not calculated in the same manner, and that the listed fringe benefits in the financial disclosure statement included expenses, such as entertainment expenses, not included in the OLFSP funding proposal. Given the murky factual and legal questions involved in plaintiffs' local, common-law claims, deferral to the courts of the District of Columbia is particularly appropriate. *See, Financial General Bankshares, Inc. v Metzger*, 680 F.2d 768, 768 (D.C. Cir. 1982)(concluding that the district court abused its discretion in exercising pendent jurisdiction over "novel and difficult issues of local law"). Thus, for the foregoing reasons, the Court declines to exercise its pendent jurisdiction over plaintiffs' local, common-law claims.

Finally, plaintiffs' third party beneficiary claim is also eviscerated by ERISA itself, which, by the terms of the Act, preempts "any and all State laws as they may now or hereafter relate to any employee benefit plan...." ERISA § 514(a), 29 U.S.C. § 1144(a).[23] The Supreme Court has broadly interpreted the Act's "relate to" terminology, explaining that Congress intended to "establish pension plan regulation as exclusively a federal concern," *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981), and concluding that state law is

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[23]The Act goes on to define "State law" as "all laws, decisions, rules, regulations, or other state action having the effect of law, of any State." ERISA § 514(c)(1), 29 U.S.C. § 1144(c)(1). Hence, the preemptive provisions of the Act cover state common law as well as statutory law.

preempted "if it has a connection with or reference to such a plan" even if the state law was not "specifically designed to affect employee benefit plans," *Shaw v. Delta Airlines*, 463 U.S. 85, 97-98 (1983). Lower courts have applied the Supreme Court's broad interpretation to dismiss state law claims for, among other things, denial of benefits, wrongful termination, intentional infliction of emotional distress, breach of contract, unfair labor practices, and fraud. *See, Howard v. Parisian, Inc.*, 807 F.2d 1560, 1563-64 (llth Cir. 1987) and cases cited therein. Although, in the case at hand, the Court does not find that plaintiffs' local law claim for accrued benefits -- excluding, significantly, pension benefits -- is preempted by ERISA, it does find that plaintiffs' third party beneficiary claim is preempted. In essence, plaintiffs seek to recover, through quasi-contract, benefits to which they are not entitled under ERISA. To allow such a claim would "upset the uniform regulation of plan benefits intended by Congress." *Howard v. Parisian, Inc.*, 807 F.2d at 1565. Hence, count XI of the amended complaint is properly dismissed both because the Court declines its pendent jurisdiction and because it is preempted by ERISA in any event.

C. Motion for Substitution of a Party Plaintiff

Rule 25(a)(1) of the Federal Rules of Civil Procedure provides that "if a party dies and the claim is not *thereby* extinguished, the court may order substitution of the proper parties." Fed. R. Civ. P. 25(a)(1) (emphasis added). In other words, substitution is proper -- assuming the original, now deceased party had a valid claim -- if the claim was not extinguished by death. *Asklar v. Honeywell, Inc.*, 95 F.R.D. 419, 29 F. Supp. 1596 (D. Conn. 1982). Because the Court has found that plaintiff Martin, like the

other plaintiffs, did not have a valid ERISA claim, it is unnecessary to decide whether the claim, if valid, would have survived Martins death. Furthermore, because the Court has declined to exercise its pendent jurisdiction over plaintiffs' common-law, claims, it is unnecessary for the Court to decide, under District of Columbia law, if Martin's contract law and quasi-contract law claims, if valid, survived his death. That question, being inextricably connected as it is to the plaintiffs' common-law claims, is properly left to the courts of the District of Columbia.

D. Defendants' Alternative Motion to Strike Plaintiffs' Claim for Punitive Damages and Request for Jury Trial

In light of the Court's disposition of plaintiffs' federal and state law claims, it is unnecessary to consider defendants' alternative motions to strike plaintiffs' demand for punitive damages and request for a jury trial.

III. Conclusion

For the reasons set forth above, the Court shall on this date enter the accompanying order and Judgment.

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
United States District Judge

DATE: MAR 30 1989

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 86-3283-RCL

BETTY JO MAYESKE, *et al.*,

Plaintiffs,

v.

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, *et al.*,

Defendants.

[Filed September 8, 1989]

MEMORANDUM OPINION AND ORDER

On March 30, 1989, this Court entered judgment in favor of defendants, and dismissed all counts of plaintiffs' complaint. The Judgment referenced the Court's Memorandum Opinion and Order entered the same date, which described each of the several plaintiffs, but drew no distinction between their claims. Thereafter, on April 11, 1989, plaintiffs filed a notice of appeal with the Court of Appeals, giving notice that "Plaintiffs Betty Jo Mayeske, *et al.*, . . . hereby appeal . . . ." Memorandum in Support of Plaintiffs' Motion to Amend Defective Judgment, at 2. Defendants then moved in the Court of Appeals for dismissal for all appellants not individually named. The matter now comes before this Court on plaintiffs' motion to amend the "defective" judgment of the Court.

In sum, plaintiffs argue that the Judgment entered by the Court was defective in that it "fail[ed] to specify the identity of the Plaintiffs to which it refers, and whether it refers to some or all of them," as purportedly required by Federal Rule of Civil Procedure 58. Plaintiffs' Motion to Amend Defective Judgment at 2. Moreover, plaintiffs reasons, because plaintiffs "relied" on the Judgment in giving notice of appeal, if their use of the caption "Plaintiffs Betty Jo Mayeske, *et al.*" was insufficient, "then necessarily the Court's appellation in the Judgment is deficient as well." Memorandum in Support of Plaintiffs' Motion to Amend Defective Judgment, at 2.

Defendants respond by pointing out that the Court's Judgment sufficiently met all requirements of the Federal Rules and "unambiguously dismissed the entire action as to all plaintiffs." Defendants' Opposition to Plaintiffs' Motion to Amend Defective Judgment, at 2-4. Hence, defendants conclude, notwithstanding plaintiffs' own "failure to comply with a jurisdictional prerequisite to a valid appeal," plaintiffs simply have no basis upon which to challenge the Court's Judgment.

The Court concurs with defendants' rationale. The Court's Judgment, particularly when read in conjunction with the Memorandum Opinion and Order entered the same date and referenced in the Judgment itself, clearly and unmistakenly dismissed all of the claims of all of the plaintiffs. Contrary to plaintiffs' argument, the Federal Rules do not require judgments to set forth the names of each and every party. Indeed, just the opposite is true. The general rule is that orders and judgments apply to all party plaintiffs or defendants, and only when particular parties are treated differently need the court specify which

parties are so treated. For example, Rule 54(b) provides, *inter alia*, that "when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is not just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. P. 54(b). In any event, the Court's Memorandum Opinion individually identified each of the plaintiffs, and then proceeded to discuss, and dispose of, all of their individual claims. Finally, as defendants correctly note, there in not a valid basis upon which to grant the relief plaintiffs seek. While Rule 60(a) would allow the Court to correct clerical mistakes in the judgment, and Rule 60(b) permits the Court to relieve a party from the judgment in case of mistake, inadvertence, excusable neglect, et cetera, none of those criteria are met here. The Judgment was neither defective not at all ambiguous. It was, as intended, this Court's final disposition of plaintiffs' complaint.

Therefore, for the reasons set forth above, it is hereby

ORDERED, that plaintiffs' motion to amend the judgment is denied.

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

Date: September 8, 1989

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-7104

Betty Jo Mayeske, *et al.*,

Appellants

v.

International Association of Fire Fighters, *et al.*,

Appellees.

BEFORE: Wald, Chief Judge; Ruth B. Ginsburg and Thomas, Circuit Judges

Filed June 8, 1990

JUDGMENT

This cause came to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby vacated and the case is remanded in

accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ Constance L. Dupre
CONSTANCE L. DUPRE, CLERK

Date: June 8, 1990

Opinion for the Court filed by Circuit Judge Thomas

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 86-3283-JGP

BETTY JO MAYESKE, *et al.*,

Plaintiffs,

v.

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, *et al.*,

Defendants.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Plaintiffs Betty Jo Mayeske, *et al.*, by their undersigned counsel, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the final Judgment of the United States District Court for the District of Columbia in

favor of the Defendants in the above-captioned matter, entered in this action on the 30th day of March, 1989.

Respectfully submitted,

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Dated: April 11, 1989

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No. 90-402

Supreme Court, U.S.
FILED
OCT 10 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BETTY JO MAYESKE, BETTY ANN MORRISON, SHAVANA MARGARET KING, and CHARLES DAVID MARTIN (deceased) by and through his representative, CHARLES LINER,

Petitioners,

v.

INTERNATONAL ASSOCIATION OF FIRE FIGHTERS, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS OFFICERS RETIREMENT PLAN, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS STAFF REPRESENTATIVES PENSION PLAN, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS EMPLOYEES' PENSION PLAN, ALFRED K. WHITEHEAD, ELLIOTT HASTINGS, JAMES MCGOWAN, DANIEL EBERHART AND JOHN A. GANNON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The petition takes issue with the ruling of the Court of Appeals (and subsequent affirmation of that ruling) which dismissed the purported appeal of three of the four plaintiffs below because they were not specifically named anywhere in the notice of appeal nor was it clear from the notice which plaintiffs were actually taking an appeal from the district court's grant of summary judgment in favor of defendants (Respondents). The question presented is whether that ruling should now be reviewed notwithstanding the fact that this Court has recently resolved a conflict in the circuits and addressed the meaning and application of Rule 3(c) of the Federal Rules of Appellate Procedure.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
ARGUMENT	5
I. THE POSITION ADVANCED BY PETITIONERS WAS REJECTED BY THE COURT IN *TORRES*	5
II. THIS CASE DOES NOT PRESENT THE ISSUE OF WHAT SHOULD BE CONSIDERED THE 'FUNCTIONAL EQUIVALENT' OF A VALID NOTICE OF APPEAL	7
III. THE ALLEGED SPLIT AMONG THE CIRCUITS IS NON-EXISTENT	8
IV. THERE IS NO INCONSISTENCY BETWEEN FED. R. CIV. P. 54(b) AND THIS COURT'S CONSTRUCTION OF FED. R. APP. P. 3(c) IN *TORRES*	11
V. PETITIONERS HAVE NO BASIS TO COMPLAIN WHEN THEIR APPEAL WAS DISMISSED DUE TO THEIR OWN INEXCUSABLE NEGLECT	13
CONCLUSION	14

TABLE OF AUTHORITIES

CASES: Page

Allen Archery, Inc. v. Precision Shooting Equipment, Inc., 857 F.2d 1176 (7th Cir. 1988) 8
Appeal of District of Columbia Nurses' Assn. (Battle v. District of Columbia), 854 F.2d 1448 (D.C. Cir. 1988), *cert. denied*, —— U.S. ——, 105 L.Ed.2d 697 (1989) 13
Ayres v. Sears, Roebuck and Co., 789 F.2d 1173 (5th Cir. 1986) 6
Browder v. Director, Ill. Dept. of Corrections, 434 U.S. 257 (1978) 7
Dura Systems, Inc. v. Rothbury Investments, Ltd., 886 F.2d 551 (3rd Cir. 1989) 8
Farley Transp. Co. v. Santa Fe Trail Transp. Co., 778 F.2d 1365 (9th Cir. 1985) 10, 12
Ford v. Nicks, 866 F.2d 865 (6th Cir. 1989) 11
Griffith v. Johnston, 899 F.2d 1427 (5th Cir. 1990) 8
Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982) 7
Johnson v. Trustees of W. Conference of Teamsters Pension Trust Fund, 879 F.2d 651 (9th Cir. 1989) 10
Kam Koon Wan v. E.E. Black, Ltd., 182 F.2d 186 (9th Cir. 1950) 12
Kim v. Fujikawa, 871 F.2d 1427 (9th Cir. 1989) 10
Meehan v. County of Los Angeles, 856 F.2d 102 (9th Cir. 1988) 10
Minority Employees of the Tenn. Dept. of Employment Security v. State of Tennessee, 901 F.2d 1327 (6th Cir. 1990), *cert. denied*, —— U.S. ——, No. 90-169 (October 1, 1990) 7, 11
National Center for Immigrants' Rights, Inc. v. I.N.S., 892 F.2d 814 (9th Cir. 1990) 10
Nevada Highway Patrol Assn. v. State of Nevada, 899 F.2d 1549 (9th Cir. 1990) 10
Schiavone v. Fortune, 477 U.S. 21 (1986) 7
Sears, Roebuck and Co. v. Mackey, 351 U.S. 427 (1956) 12

TABLE OF AUTHORITIES—Continued

Page

Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988) 5, 6, 7, 10, 13

Tri-Crown, Inc. v. American Federal S&L Assn., 908 F.2d 578 (10th Cir. 1990) 9, 10

STATUTES:

Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 *et seq.*

29 U.S.C. § 1002(6) 2

29 U.S.C. § 1132(a) 2

FEDERAL RULES:

Federal Rules of Appellate Procedure

Fed. R. App. P., 3(c) ..... *passim*

Federal Rules of Civil Procedure

Fed. R. Civ. P., 54(b) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-402

BETTY JO MAYESKE, BETTY ANN MORRISON, SHAVANA MARGARET KING, and CHARLES DAVID MARTIN (deceased) by and through his representative, CHARLES LINER,

Petitioners,

v.

INTERNATONAL ASSOCIATION OF FIRE FIGHTERS, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS OFFICERS RETIREMENT PLAN, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS STAFF REPRESENTATIVES PENSION PLAN, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS EMPLOYEES' PENSION PLAN, ALFRED K. WHITEHEAD, ELLIOTT HASTINGS, JAMES MCGOWAN, DANIEL EBERHART AND JOHN A. GANNON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

All respondents jointly submit this brief in opposition to the petition for a writ of *certiorari* which seeks review of the rulings of the United States Court of Appeals for the District of Columbia Circuit in which the purported appeal of three of the four plaintiffs below (Petitioners) was dismissed for failure to comply with

Rule 3(c) of the Federal Rules of Appellate Procedure. A list of all the parties, citations to the opinions below, the basis of this Court's jurisdiction and the pertinent appellate rule are set worth in the *certiorari* petition (hereinafter "Pet.") and therefore are not repeated here.

STATEMENT OF THE CASE

Petitioners herein first commenced an action against all Respondents (defendants below) on November 28, 1986 in the U.S. District Court for the District of Columbia. Petitioners brought their action under Section 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), *as amended*, 29 U.S.C. § 1132(a), Section 410 of the Internal Revenue Code, and pursuant to a common law third-party beneficiary theory claiming they were beneficiaries to a contract between Defendant-Respondent International Association of Fire Fighters ("IAFF") and the United States Government. Petitioners alleged that defendants (Respondents) engaged in conduct that violated both ERISA and the Internal Revenue Code, and for their alleged harm they requested injunctive relief, compensatory damages, punitive damages and statutory fines against Respondents.

On March 30, 1989, the District Court (per the Honorable Royce C. Lamberth), found Petitioners' claims to be devoid of any merit, and in granting Respondents' motion for summary judgment, dismissed Petitioners' complaint in its entirety. In its written opinion, the District Court held, as a threshold matter, that Petitioners were not "employees" of IAFF within the meaning of ERISA Section 3(6) (29 U.S.C. § 1002(6)), and therefore, their ERISA-related claims must fail (because such claims were dependent, from a jurisdictional standpoint, on Petitioners occupying the legal status of IAFF "employees"). Pet. App. 51a-54a. Alternatively, the District Court held that even if Petitioners were "employees" of IAFF, then based on the entire record, their claims (including a claim that IAFF retaliated against them for engaging in protected conduct) lacked both fac-

tual and legal support. Pet. App. 57a-69a. A written judgment in favor of Defendants-Respondents directing that Petitioners "take nothing" was entered by the district court on March 30, 1989. Said judgment satisfied Rule 58 of the Federal Rules of Civil Procedures in all respects.

On April 11, 1989, a Notice of Appeal was filed, ostensibly for the purpose of appealing the district court Judgment that had been entered. The appeal was docketed in the Court of Appeals as *Case No. 89-7104*. The only Plaintiff named in the Notice of Appeal was Betty Jo Mayeske.

Respondents then filed (in No. 89-7104) a Motion to Dismiss the Appeal of All Plaintiffs Not Named in the Notice of Appeal. Petitioners took several actions in responding to this motion: (1) they filed a written opposition to the motion; (2) they simultaneously filed their own motion in the Court of Appeals "For Leave To Amend Defective Judgment", therein seeking "leave to permit the district court to amend its judgment . . . to name each Plaintiff not included within the Judgment"; and (3) they filed a motion in the District Court "To Amend Defective Judgment," requesting that court to enter a new Judgment "specifying that it applies to all Plaintiffs, and, if not, the identity of the Plaintiffs to which it applies."

None of these tactics by Petitioners met with any success. First, on September 8, 1989, the district court *denied* Plaintiffs' motion to amend the defective judgment; holding that its judgment was clear, unambiguous and complied with the applicable rule of civil procedure. Pet. App. 71a-73a. Thereafter, on September 22, 1989, the Court of Appeals granted Petitioners' motion to dismiss the appeal in Circuit Case No. 89-7104 of all Plaintiffs not named in the notice of appeal. Pet. App. 1a-2a. The Court of Appeals also ordered that Petitioners' motion for leave to permit the District Court to amend its judg-

ment be *denied. Id.* Refusing to concede that the litigation on the underlying claims was at an end for the three of them, Petitioners then fired two more misplaced volleys. On October 6, 1989, they filed a Notice of Appeal challenging the District Court's denial of their motion to amend the judgment which was docketed in the Court of Appeals as Case No. 89-7233. On or about October 20, 1989, Petitioners filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* in Circuit Case No. 89-7104, seeking reconsideration of the Court of Appeals' order which had dismissed the appeal of the three plaintiffs who had not been named in the Notice of Appeal.

Subsequently, on December 5, 1989, the Court of Appeals reaffirmed its earlier order dismissing the appeal of the three Petitioners in Circuit Case No. 89-7104. A new order was issued on that date *denying* the petition for rehearing and suggestion for rehearing *en banc*. Pet. App. 3a-4a. On that same date, the Court of Appeals also dismissed Petitioners' companion appeal which sought to overturn the District Court's denial of their motion to amend the judgment. Pet. App. 29a.

On June 8, 1990, the Court of Appeals issued a decision in the appeal of the sole remaining appellant (Betty Jo Mayeske). Pet. App. 5a-26a. That court concluded that Mayeske had in fact been an "employee" of IAFF, and on that basis alone, reversed the District Court's grant of summary judgment in favor of Respondents. The Court of Appeals did not review any of Mayeske's substantive claims on the merits, remanding the case to the District Court with instructions that it reconsider those claims in light of the appellate determination that Mayeske enjoyed "employee" status. Pet. App. 26a.

ARGUMENT

There are several reasons that militate against granting the instant petition, not the least of which is that this Court has already addressed, in a definitive opinion, the issue that is at the heart of the petition.

I. THE POSITION ADVANCED BY PETITIONERS WAS REJECTED BY THE COURT IN *TORRES*

In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), the Court held that a litigant's failure to file a notice of appeal that conforms strictly with the specificity requirement of Federal Rule of Appellate Procedure 3(c) presents a jurisdictional bar to the appeal. More specifically, the Court stated that "[t]he failure to name a party in the notice of appeal is more than excusable 'informality'; it constitutes a failure of that party to appeal." 487 U.S. at 314.

That the Court has enunciated a strict interpretation of Rule 3(c) (requiring that would-be appellants be specifically named in the notice of appeal) is confirmed by the legal background against which *certiorari* was granted in *Torres*. Notably, the Court granted *certiorari* in order to resolve a conflict among the circuit courts over the meaning and application of Rule 3(c). A review of the decisions which the Court cited as being in conflict [1] reveals that the disagreement among the circuits centered on whether something less than actually naming the individual parties who were taking an appeal from an adverse judgment would satisfy the specificity requirement of Rule 3(c). The Court concurred with the Courts of Appeals for the Fourth, Sixth and Ninth Circuits which had held that the failure to name a would-be appellant required dismissal of that litigant's appeal on jurisdictional grounds. In affirming such rule, the Court rejected the approach taken by other circuits which had concluded

[1] Those circuit court decisions are cited at 487 U.S. 312, 314 n.1.

that something less than specifically naming the individual appellants in the notice of appeal did not deprive the appellate courts of jurisdiction.

Further, a review of those decisions which the Court found to be flawed reveals that the Court intended its holding in *Torres* to extend far beyond the specific facts of that case. For example, the notice of appeal filed in *Ayres v. Sears, Roebuck and Co.*, 789 F.2d 1173 (5th Cir. 1986), was substantially similar to the appeal notice filed in this case; i.e., the *Ayres* notice was submitted by "Joanne Ayres, *et al.*, Plaintiffs above named. . . ." 789 F.2d at 1177. Although one of the plaintiffs was not "above named" in the caption of the notice, the Fifth Circuit nonetheless refused to dismiss the appeal of the omitted party because there was an identity of issues in the appeals of the named and unnamed parties, and because all parties utilized the designation "*et al.*" when referring to the plaintiffs throughout the course of the proceedings in the district court and again in the notice of appeal. The Fifth Circuit then concluded that the failure to name an individual plaintiff in the appeal notice did not cause any surprise, detrimental reliance or prejudice to appellees. *Id.* *However*, this Court rejected the Fifth Circuit's reasoning, finding it to be at odds with the requirements of Federal Rule of Appellate Procedure 3(c).

Thus, while Petitioners assert that there is a question of federal law which was left unresolved by *Torres*, Pet. 7, this Court in fact put to rest, once and for all, arguments such as those that Petitioners now advance in a desperate attempt to salvage their appeal. *Torres* holds that there is a bright-line standard by which to judge the adequacy of a notice of appeal. In *all* cases, Rule 3(c) is to be given an exacting and literal interpretation, such that the failure to specifically name a party in a notice of appeal serves to forfeit that party's right to appeal.

Torres is not the first case in which this Court has required strict compliance with a procedural rule. *See, e.g., Schiavone v. Fortune*, 477 U.S. 21 (1986) (construing Fed. R. Civ. P. 15(c)); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982) (construing Fed. R. App. P. 4(a)(4)); *Browder v. Director, Ill. Dept. of Connections*, 434 U.S. 257 (1978) (construing Fed. R. App. P. 4(a)). As the Sixth Circuit noted after surveying the above-cited decisions of this Court, "certain rules are deemed sufficiently critical in avoiding inconsistency, vagueness and an unnecessary multiplication of litigation to warrant strict obedience even though application of the rules may have harsh results in certain circumstances." *Minority Employees of the Tenn. Dept. of Employment Security v. State of Tennessee*, 901 F.2d 1327, 1329 (6th Cir. 1990) (*en banc*), *cert. denied*, —— U.S. ——, No. 90-169 (October 1, 1990).

II. THIS CASE DOES NOT PRESENT THE ISSUE OF WHAT SHOULD BE CONSIDERED THE 'FUNCTIONAL EQUIVALENT' OF A VALID NOTICE OF APPEAL

Petitioners argue that *certiorari* should be granted because there is a need to address the question of what actions constitute the functional equivalent of filing a proper notice of appeal (suggesting that their notice contains language that is the functional equivalent of designating each party who is taking an appeal). As support for this assertion, petitioners focus on the Court's statement in *Torres* that "if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires." 487 U.S. at 316-317. Pet. 8-9.

Petitioners, however, read too much into this statement. The functional equivalent of a notice of appeal means *some other paper* filed within the applicable time

limit for initiating an appeal that complies with the specificity requirement of Rule 3(c) by naming all parties to the appeal. *See, e.g., Dura Systems, Inc. v. Rothbury Investments, Ltd.*, 886 F.2d 551 (3rd Cir. 1989); *Allen Archery, Inc. v. Precision Shooting Equipment, Inc.*, 857 F.2d 1176 (7th Cir. 1988).[2] In the present case, no other papers were filed by Petitioners in the Court of Appeals within the time allowed under Fed. R. App. P. 4(a) for filing an appeal. Hence, there are simply no facts presented in this case which would allow the Court to make a determination as to whether the "functional equivalence" test was satisfied.

III. THE ALLEGED SPLIT AMONG THE CIRCUITS IS NON-EXISTENT

Petitioners argue, as an additional ground for seeking review, that the dismissal of three plaintiffs from the appeal by the District of Columbia Circuit points out a split among the Courts of Appeals regarding the requirement in Rule 3(c) that parties be specifically identified in the notice of appeal. Pet. 12-14. A closer examination of the decisions issued by those circuits that are purportedly at odds with the decision below by the D.C. Circuit reveals that no true conflict exists.

In *Griffith v. Johnston*, 899 F.2d 1427 (5th Cir. 1990) (cited at Pet. 13 n.5), the would-be appellants drafted their notice of appeal in the form, "Susan and Reggie Griffith, et al.", omitting the names of the other plaintiffs. Citing *Torres*, the Fifth Circuit held that as to all plaintiffs besides Susan and Reggie Griffith and their children (on whose behalf the parents appealed), plaintiffs filed a defective notice of appeal. Specifically, the court stated that "[a]n appellate court lacks jurisdiction over an intended appeal by parties other than those named in the notice." 899 F.2d at 1430. This is in fact

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[2] A defective notice can never be the functional equivalent of a notice of appeal.

the *same* conclusion reached by the D.C. Circuit in the present case. Pet. App. 2a.

In *Tri-Crown, Inc. v. American Federal S&L Assn.*, 908 F.2d 578 (10th Cir. 1990), each plaintiff-appellant was named in the caption to the notice of appeal and there was a separate signature block below for each plaintiff that was appealing the adverse judgment. The Tenth Circuit held that under such circumstances, the notice of appeal adequately identified the appellants.

Clearly, the appeal notice in the present case does not even remotely resemble the appeal notice in *Tri-Crown, Inc.* The caption is styled simply, "Betty Jo Mayeske, *et al.*, plaintiffs,". The confusion which is created by this vague designation as to which litigant is appealing is then compounded in the body of the notice by the equally ambiguous statement that "Plaintiffs, Betty Jo Mayeske, *et al.*, . . . hereby appeal." In a multi-plaintiff case such as this, the designation of would-be appellants as appears in the Notice of Appeal raises several different possibilities. While seemingly more than one plaintiff below wishes to appeal, it is not at all clear from this Notice whether all four plaintiffs are included in the appeal or some smaller subset (e.g., two or three). Indeed, the unfortunate death of one plaintiff (Charles David Martin) several months before summary judgment was granted in defendants' (Respondents') favor serves to highlight the need for a more exacting designation than what appears in the Notice of Appeal. When not specifically named, it is not at all clear that a litigant who died before judgment was entered is to be included in the appeal.[3] Consequently, while the D.C. Circuit did

[3] Although a motion was filed in the District Court to substitute the personal representative (Charles Liner) of the estate of David Martin as a party-plaintiff, such action itself does not automatically indicate that the decedent's claim is to be pursued through all possible levels of appeal. The executor or administrator of a decedent's estate is concerned primarily with winding up the affairs of the estate as expeditiously as possible, i.e., to account for and distribute

reach a different result from the Tenth Circuit, there is no conflict given the fact that the notices of appeal in the two cases are significantly different (notably, the parties who were appealing in *Tri-Crown, Inc.* were specifically named in the Notice of Appeal).

Nor is there any conflict between the decision below and any decision of the Ninth Circuit. It should be recalled that in deciding *Torres*, this Court concurred with the Ninth Circuit's decision in *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 778 F.2d 1365 (9th Cir. 1985), wherein the Ninth Circuit gave a "literal interpretation" to Rule 3(c), eschewing an "equitable" approach even in those instances were failure to comply with the rule does not mislead or prejudice the other side. 778 F.2d at 1369.

In several cases decided subsequent to *Farley Transp. Co.* and *Torres*, the Ninth Circuit has continued to require that parties adhere strictly to the specificity requirement of Rule 3(c).[4] *National Center for Immigrants' Rights, Inc. v. I.N.S.*, 892 F.2d 814 (9th Cir. 1990), which Petitioners assert is in conflict with the ruling below, is not actually a divergent opinion. In *I.N.S.*, the body of the appeal notice stated that "Notice is hereby given that defendants in the above-referenced action hereby appeal. . . ." The defendants were the Immigration and Naturalization Service, its Commissioner and the Attorney General—all components or agents of the Federal Government, and more particu-

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assets that exist at the time of death; rather than attempting to augment those assets by continuing to litigate claims that have since been denied.

[4] *See, e.g., Meehan v. County of Los Angeles*, 856 F.2d 102, 105 (9th Cir. 1988); *Kim v. Fujikawa*, 871 F.2d 1427, 1430 n.1 (9th Cir. 1989); *Johnson v. Trustees of W. Conference of Teamsters Pension Trust Fund*, 879 F.2d 651, 653 n.1 (1989); *Nevada Highway Patrol Assn. v. State of Nevada*, 899 F.2d 1549, 1551 n.1 (9th Cir. 1990) ([T]he plaintiffs not identified by name in the notice of appeal are not parties to this appeal.").

larly, all part of the same umbrella agency, i.e., the Department of Justice. In actuality then, there were not three defendants in the case, but only one true defendant; that being the United States Government (or the Department of Justice). Thus, it was not surprising (or necessarily wrong) for the Ninth Circuit to hold that the generic term "defendants" adequately identified the appellant(s). The result in *I.N.S.* appears to be fact-specific.[5]

In sum, Petitioners' perception that the ruling below is in conflict with other circuit court decisions is not accurate.

IV. THERE IS NO INCONSISTENCY BETWEEN FED. CIV. P. 54(b) AND THIS COURT'S CONSTRUCTION OF FED. R. APP. P. 3(c) IN *TORRES*

Petitioners also assert the peculiar proposition that because district court judgments often use the generic term "plaintiffs" in dismissing multiparty suits rather than identifying each plaintiff separately, an inconsistency arises if litigants are dismissed from an appeal because the same generic term is used in the notice of appeal without specifying each would-be appellant. Pet. 15-16. This proposition contains several obvious flaws.

First, Petitioners seriously misconstrue Rule 54(b) of the Federal Rules of Civil Procedure and the circumstances in which the rule operates. Rule 54(b), Fed. R. Civ. P.,

> does not apply to . . . a multiple claims action in which all of the claims have been finally decided. It

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[5] It must also be noted that the Ninth Circuit panel that decided *I.N.S.* was influenced by the earlier Sixth Circuit decision in *Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989), a case that was subsequently overruled by the Sixth Circuit *en banc* in *Minority Employees of the Tenn. Dept. of Employment Security, supra.* Thus, it is not at all certain whether the Ninth Circuit would even decide *I.N.S.* the same way today.

> is limited expressly to multiple claims actions in which "one or more but less than all" of the multiple claims have been finally decided and are found otherwise to be ready for appeal.

Sears, Roebuck and Co. v. Mackey, 451 U.S. 427, 435 (1956). Thus, there is nothing in this rule, as Petitioners contend, that requires a district court to specify whether a judgment extends to all, or fewer than all parties. To the contrary, there is a presumption that the judgment applies to all parties on one side, unless the court expressly indicates otherwise.

In the present case, the District Court adjudged "that plaintiffs take nothing." The judgment thus unambiguously dismissed the entire action as to all plaintiffs.[6] At that point, it became incumbent upon each plaintiff who desired to appeal to perfect his/her appeal rights by filing a proper notice of appeal. The notice of appeal is governed not by the Federal Rules of Civil Procedure, but by the *Federal Rules of Appellate Procedure*. Because the litigation in the district court is at an end and appeal is not automatic, Rule 3(c) requires that the appeal notice separately name each party who is appealing, thereby "avoid[ing] the need to determine which parties are actually before the court [of appeals] long after the notice of appeal has been filed." *Farley Transp. Co. supra*, 778 F.2d at 1369.

Hence, there is no inconsistency between the Rules of Civil Procedure and the Rules of Appellate Procedure. The two sets of rules are designed to serve different purposes.

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[6] Therefore, *Kam Koon Wan v. E.E. Black, Ltd.*, 182 F.2d 146 (9th Cir. 1950), which Petitioners cite, is inapposite. Unlike this case, the so-called "Judgment" in *Kam Koon Wan* did not finally dispose of the claims of all the complaining parties.

V. PETITIONERS HAVE NO BASIS TO COMPLAIN WHEN THEIR APPEAL WAS DISMISSED DUE TO THEIR OWN INEXCUSABLE NEGLECT

The petition concludes with an argument that is based more on emotion than on legal reasoning. Petitioners contend that *Torres* and similar appellate decisions (like the one by the D.C. Circuit that dismissed their appeal) deny substantial justice to litigants. In short, Petitioners lament that *Torres* creates a trap for unwary litigants like themselves. Pet. 17.

The obvious problem with this argument is that it ignores the actual reason for the D.C. Circuit's dismissal of Petitioners' appeal. Petitioners were not precluded from appealing because of a novel application of a procedural rule. They were barred from the appellate process because of their own inexcusable failure to follow previously announced precedent. *Torres* was decided and the opinion reported long before Petitioners filed their defective Notice of Appeal. Further, if Petitioners had some reason to believe that the D.C. Circuit might deviate from a strict interpretation of Fed. R. App. P. 3(c), such belief should have been dispelled by the D.C. Circuit's decision in *Appeal of District of Columbia Nurses' Assn.* (*Battle v. District of Columbia*), 854 F.2d 1448 (D.C. Cir. 1988), *cert. denied*, —— U.S. ——, 105 L.Ed.2d 697 (1989). In that case, the D.C. Circuit, citing *Torres*, dismissed the purported appeal of the D.C. Nurses Association because the organization was not named in the notice of appeal. This D.C. Circuit opinion (issued on August 30, 1988) also appeared in the official reporter some months before the date Petitioners filed their Notice of Appeal (on April 11, 1989).

Certainly after *Torres* and *District of Columbia Nurses Assn.*, the careful litigant would have made sure that he or she was specifically named in the Notice of Appeal rather than leaving it to chance that some ambiguous designation would satisfy the jurisdictional re-

quirement of Rule 3(c). Petitioners must now accept the consequences of their own carelessness.

CONCLUSION

For the reasons stated above, this Court should deny the petition for a writ of *certiorari*.

Respectfully submitted,

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